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**Postcommunist Constitutional Courts
in Search of Political Legitimacy**

WOJCIECH SADURSKI

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Postcommunist Constitutional Courts in Search of Political Legitimacy

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I. Introduction

One of the most striking features of the transitions to democracy in Central and Eastern Europe (CEE) has been the spectacular growth in the role and prominence of constitutional courts and tribunals in shaping the new constitutional order. Before the fall of communism there existed only two constitutional tribunals in CEE: in Yugoslavia since 1963 and in Poland since 1985.¹ While they were not exactly sham institutions, their position was hardly one that allowed the exercise of a robust constitutional review. Quite apart from the legal definitions of their competence, the genuine powers of both were inevitably subject to the restrictions stemming from Communist party rule. The situation today is one in which all the post-communist countries of CEE have constitutional courts, and while the effectiveness of these tribunals varies, they have without exception stamped their authority on the process of constitutional transition. Many of them have performed a wide range of constitutionally prescribed roles, including overseeing elections and referenda, deciding upon the prohibition of political parties and adjudicating on the conflicts of competencies between state institutions. The most significant impact of constitutional tribunals however has been in that area which is the central focus of this Working Paper: the review of enacted law. Evaluating statutes for their consistency with the constitution is probably the most significant – and undoubtedly the most controversial – function that constitutional courts perform in CEE, and elsewhere in the world.

At least some of the constitutional courts of the region have dealt with national legislation in a manner contrary to the wishes of the parliamentary

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¹ It was actually in 1982 that the constitutional amendment creating the Polish Constitutional Tribunal was passed but not until 1985 that the statute on the Constitutional Tribunal, which established a specific basis for that body, was enacted. The Tribunal began its operations in January 1986.

For the sake of completeness, mention should also be made of the Czechoslovakian Constitutional Court of the interwar period, although it was a rather insignificant body, see Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago: University of Chicago Press 2000), pp. 29-30.

majorities and governments of the day. Important aspects of laws on abortion,² the death penalty,³ “lustration” (the screening of officials suspected of improprieties under the auspices of the *ancien regime*),⁴ criminal prosecution of former communist officials responsible for crimes against the people during the communist period,⁵ economic austerity measures,⁶ fiscal policy,⁷ citizenship

² See, e.g., Decision of the Polish Constitutional Tribunal of 28 May 1997, no. K. 26/96, in *Orzecznictwo Trybunału Konstytucyjnego, Rok 1997 [Case Law of the Constitutional Tribunal, 1997]*, (Warszawa: C.H. Beck 1998), pp. 173-246. This decision was reprinted in *East European Case Reporter of Constitutional Law* 6 (1999), pp. 38-129. The decision invalidated certain amendments of June 1994 to Penal Code which liberalized abortion rights, and is discussed below, in Part III of this Working Paper. See also the decision of Hungarian Constitutional Court of 17 December 1991, no. 64/1991, reprinted in László Sólyom & Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbor: University of Michigan Press 2000), pp. 178-203.

³ The abolition of the death penalty was decided by the constitutional courts in Lithuania, Albania, Ukraine and Hungary. For the text of the Hungarian Court’s decision declaring capital punishment unconstitutional (decision 23/1990 of 31 October 1990) see Sólyom & Brunner, supra note 2 at pp. 118-38; the decision was also reprinted in *East European Case Reporter of Constitutional Law* 1 (no. 2) (1994) at pp. 177-205.

⁴ For example, in Hungary the Constitutional Court found a number of constitutional problems with the law on lustration passed by the Parliament early in 1994 (Decision no. 60/1994, of 22 December 1994, reprinted in *East European Case Reporter of Constitutional Law* 2 (1995) pp. 159-193). In order to comply with the Court’s decision, the Parliament had to rewrite the law which it did by July 1996. The new law (passed by the Parliament dominated by a different majority from that in 1994) greatly reduced the scope of lustration. For a discussion, see Gábor Halmai & Kim Lane Scheppele, “Living Well Is the Best Revenge: The Hungarian Approach to Judging the Past”, in A. James McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press 1997), pp. 155-84 at pp. 177-8. Lustration laws were also struck down, or substantially weakened, by Constitutional Courts in Albania and Bulgaria, see Ruti Teitel, “Post-Communist Constitutionalism: A Transitional Perspective”, *Columbia Human Rights Law Review* 26 (1994), pp. 167-90 at pp. 180-82.

⁵ In a Decision 11/1992 of 5 March 1992 the Hungarian Constitutional Court struck down *An Act Concerning the Right to Prosecute Serious Criminal Offences committed between 21 December 1944 and 2 May 1990 that Had Not Been Prosecuted for Political Reasons* of 4 November 1991. The effect of the statute would have been to extend retrospectively statutory period of limitation during which offences occurring in the 1956 massacres could be prosecuted. The decision is reprinted in Sólyom & Brunner, supra note 2 at pp. 214-28.

⁶ For example, the Hungarian Constitutional Court struck down important aspects of a number of laws which were meant to constitute a package of austerity measures introduced by the Government in 1995; see e.g. decision 43/1995 of 30 June 1995 on social security benefits, reprinted in Sólyom & Brunner, supra note 2 at pp. 323-32.

⁷ See, e.g., the decision of Polish Constitutional Tribunal; no. K 8/97 of 16 December 1997 striking down a number of provisions of the tax statute of 26 July 1991, reprinted in *Orzecznictwo Trybunału Konstytucyjnego, Rok 1997 [Case Law of the Constitutional Tribunal, 1997]*, (Warszawa: C.H. Beck 1998), pp. 545-59.

requirements,⁸ personal identification numbers for citizens,⁹ and indexation of pensions,¹⁰ have all been struck down. It is no coincidence that the Hungarian Constitutional Court figures so prominently in this list of examples. It is perhaps the most activist constitutional court not only in the CEE but also in the world.¹¹ More importantly for present purposes, according to one of its leading commentators, “[i]t serves as the exemplar for every new Constitutional Court in Central Europe”.¹² Some of these decisions have had enormous financial and budgetary implications; some transgressed clear and strong majority feelings and others rode roughshod over delicately crafted political compromises. There have been decisions taken on the basis of perceived irregularities in law-making procedures and in the constitutional divisions of powers among the lawmaking bodies, but far-reaching decisions have also been based on the constitutional justices’ interpretations of vague and unclear constitutional substantive provisions on which reasonable people may disagree.

While there are certain local variations, one may attempt a description of the common model of a constitutional tribunal in the region. The model adopted is that of a “concentrated” or “centralised” constitutional review, conducted by a court composed of judges appointed for limited tenure by political branches of government, exercising abstract, ex-post and final review of constitutionality of statutes and other infra-constitutional acts. There are, however, also some departures from the dominant model which I will now briefly note.

Centralised and concentrated review is understood as an arrangement by which only one institution in each of these countries has the right authoritatively

⁸ In Slovenia, the Constitutional Court decided Case No. U-I-206/97, annulling on 17 June 1998 part of a law on the amendments to the Law on Foreigners. The amendments would change the required period before an immigrant could apply for permanent resident status from three to eight years. See “Constitution Watch”, *East European Constitutional Review* 7 no. 3 (1998) pp. 36-37.

⁹ On 13 April 1991, the Hungarian Constitutional Court declared the use of uniform personal identification numbers unconstitutional, decision 15/1991, reprinted in Sólyom & Brunner, *supra* note 2 at pp. 139-50.

¹⁰ Croatian Constitutional Court invalidated in 1998 a provision of the 1993 Code on Equating Retirement Incomes on the basis that the code demanded that pensions increase relative to changes in the cost of living rather than relative to the increase of average incomes, see “Constitution Watch”, *East European Constitutional Review* 7 no. 3 (1998), p. 9. Polish Constitutional Tribunal ruled on 17 July 1996 that a 1995 law which would suspend the indexation of pensions in the forth quarter of 1996 was unconstitutional, Decision K. 8/96 in *Orzecznictwo Trybunału Konstytucyjnego, Rok 1996 [Case Law of the Constitutional Tribunal, 1996]*, vol. 2 (Warszawa: C.H. Beck 1998), pp. 46-65..

¹¹ This is the view of Wiktor Osiatynski, “Rights in New Constitutions of East Central Europe”, *Columbia Human Rights Law Review* 26 (1994), pp. 111-166 at p. 151; see also Jon Elster, “Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea”, *Public Administration* 71 (1993) pp. 169-217 at p. 199.

¹² Spencer Zifcak, “Hungary’s Remarkable, Radical, Constitutional Court”, *Journal of Constitutional Law in Eastern and Central Europe* 3 (1996), pp. 1-56 at p. 26.

to scrutinise laws for their constitutionality. No ordinary judge has such a right. The most they can do if they have doubts about constitutionality of a legal rule which they are called on to apply, is to suspend the proceedings and refer the question to the Constitutional Court (so-called "concrete review"). The rule against the ordinary judiciary's power to strike down infra-constitutional law is very strict, based as it is on fear of a possible threat to the unity of the legal system should individual judges have such power. But it is also based on more contingent factors. The regular judiciary in these countries, following a continental model, enjoys a relatively low status and cannot be trusted (in the views of constitution makers) with making such momentous judgements as the compatibility of a statutory provision with the Constitution.

Hence, this task is conferred upon a special body, established outside the regular judicial system, and often regulated by constitutional provisions separate from the chapters on the judiciary.¹³ The only, and minor, exception is Estonia where the constitutional court is known as the "Chamber of Constitutional Review" and is structurally a part of the National Court (the equivalent of the Supreme Court). This, however, does not importantly affect its position in the overall constitutional system and, for all practical purposes, the Estonian Chamber can be viewed as a constitutional court, like any other in the region.

Judges of constitutional courts are appointed for a limited tenure, usually for nine years.¹⁴ With very few exceptions, constitutional justices tend to be either legal scholars (with a marked preponderance of constitutional law professors) or senior members of the "regular" judiciary. The appointment process is thoroughly political, although "high legal qualifications" (or an equivalent description) are usually listed as one of the criteria of eligibility. In most Central and Eastern European countries, constitutional judges are appointed in a process which requires the participation of both the legislative and executive branches (Romania, Albania, Czech Republic, Slovakia, Russia, etc). In some countries, the highest bodies representing the judiciary are also involved (Bulgaria, Lithuania and Ukraine). Two of the most active constitutional courts of the region constitute an exception. In both Hungary and Poland, constitutional justices are appointed exclusively by the parliaments. This has been criticised by an eminent Polish legal scholar (who is also currently a constitutional court judge) as creating a "risk of excessive politicisation" of the appointment process.¹⁵

¹³ For example, the provisions regarding constitutional courts are separate from the chapters on the judiciary in the constitutions of Romania, Hungary, Lithuania, Bulgaria and Ukraine. In the constitutions of Slovakia, Czech Republic, Russia and Poland constitutional courts are governed by constitutional regulations alongside the judicial bodies.

¹⁴ Although different limits may apply: 6 years in Moldova, 8 years in Croatia, 10 years in the Czech Republic.

¹⁵ Leszek Garlicki, "Trybunał Konstytucyjny w projekcie Komisji Konstytucyjnej Zgromadzenia Narodowego", *Państwo i Prawo* 51 (2/1996): 3-19, p. 6.

The most important power of Constitutional Courts, for present purposes, is their exercise of abstract judicial review. This means that the statutory rule is considered not in the actual context of a specific case but *in abstracto*. It is the textual dimension of the rule, rather than its life in the application to real people and real legal controversies, which is assessed by judges in comparison with their understanding of the text of a relevant constitutional rule. Most of these courts also exercise a power of *concrete* review, initiated by other courts,¹⁶ and some of them (Hungary, Poland, Slovenia etc) will also hear citizens' constitutional complaints, brought by those individuals who believe that their constitutional rights have been violated by a judicial and/or administrative decision issued on the basis of the infra-constitutional law, the constitutionality of which is questionable. However, it is the "abstract" review initiated by other bodies (the President, the government) or by a group of MPs (usually, members of the minority outvoted on a law which they subsequently challenge before the Court) which raises the gravest legitimacy problems. It is on such occasions that the clash of different views about what an open textured constitutional norm "really" means occurs with the greatest severity, and the question "who should have the last word?" seems most apposite.

Abstract review is problematic for a number of reasons. From the perspective of the division of authority between the legislature and the constitutional court, abstract review is troubling for the reason that it is often initiated by those political actors dissatisfied with a majoritarian decision of the parliament – that is, they lost the debate. It also makes no necessary allowance for those principles which reduce the clash between the legislature and the judiciary where the review of constitutionality is dependent upon consideration of a specific case. Consider the doctrines elaborated by the United States Supreme Court that the court will avoid deciding "political questions", or cases which are not "ripe" enough, or which are "moot", all of which constrain judges from deciding questions of constitutionality. But no such doctrines are relevant to the system of "abstract" review. A challenge to recently passed legislation, depending on its substance, may be very much a "political question", is "ripe" automatically when the law is passed, and will not cease being "moot" as long as the law is on the books.

It has been mentioned above that the dominant model in Central and Eastern Europe is of an ex-post review, that is, review of the laws already enacted, although there are some exceptions. In Romania, abstract review can apply only to statutes adopted by the Parliament but before the promulgation (while there is also a path open for a concrete review, initiated by courts, which by its very nature can be only ex post). This resembles the position of the French *Conseil constitutionnel* which also can review parliamentary acts only before promulgation. Further, some other constitutional courts in the region (in

¹⁶ Although not in Ukraine where only abstract review is envisaged.

Poland, Hungary and Estonia), in addition to their more routine, ex-post review, can be asked by the respective Presidents to conduct an ex-ante review of the act just passed by the Parliament, and one court (in Hungary) can even be asked to issue an advisory opinion about a bill not yet voted on by the Parliament. There is however a marked tendency to view the prospective review and advisory opinions as the exception rather than the rule.

With the exception of Romania, decisions about the unconstitutionality of statutes in all Central and Eastern European countries are final, and there is no way of reversing the verdict other than by a constitutional amendment. In Romania, verdicts of the Constitutional Court resulting from an abstract review, conducted prior to promulgation, can be overridden by a two-thirds majority of both chambers. In Poland, a similar possibility existed until the Constitution of 1997 introduced the finality of all Constitutional Court decisions.

Finally, it should be mentioned that constitutional courts in the region - consistently with their Western European prototypes - perform a number of other functions such as deciding in cases of conflict regarding powers of other constitutional bodies, the status of political parties, the constitutionality of international treaties, and elections or referendums. These matters, however, lie beyond the scope of this working paper.

My purpose here is to discuss the main aspects of the phenomenon of the emergence of Constitutional Courts in CEE, insofar as they are relevant to their quest for legitimacy. I will begin by an account of the ways in which the constitutional *doctrine* supplies the legitimating justifications to those Courts (Part II). I shall then turn to the issue of the place of the constitutional court in the overall architecture of the branches of government, and more specifically, to the question of whether they belong to the judiciary or to the legislative branch, and what difference it makes to the legitimacy problem (Part III). The problem of legitimacy arises in the first place if we characterize those courts as "activist" rather than "restrained" or "deferential", and so in Part IV I consider the grounds, if any, upon which we may indeed properly characterize those courts as "activist". In Part V I review, and critically assess, various explanations given in constitutional theory for the adoption of this particular model of constitutional review which had emerged in CEE rather than, say, the "American model" which, as I argued elsewhere, raises fewer legitimacy problems.¹⁷ Finally, in Part VI the crucial issue of the finality of decisions of constitutional courts will be explored: do these courts indeed have a "last word" on the question of the validity of statutes, and what departures from the finality would alleviate the legitimacy concerns?

¹⁷ See Wojciech Sadurski, "Judicial Review, Separation of Powers and Democracy: The Problem of Activist Constitutional Tribunals in Postcommunist Central Europe", *Studi Politici* 3 (1999): 93-117.

II. Provision of legitimacy in constitutional discourse

Constitutional discourses in and about CEE – that is, the accounts and analyses of constitutional developments, produced by the scholars, observers, lawyers and politicians – have been extremely generous in their praise of constitutional courts. Indeed, in much of the scholarly discussions those courts have been credited with playing *the* central role in constitutional transition from authoritarianism to democracy; they are seen (in the words of a prominent American lawyer) as “the flagships of the rule of law and constitutional faith in the emergent Eastern European democracies”.¹⁸ They have been described as the promoters and defenders (often, nearly the only promoters and defenders) of the values of constitutionalism, the rule of law and human rights in political and legal environments contaminated by legal nihilism and marked by a disregard for individual rights and the lack of a tradition of *Rechtsstaat*. The following observation by Herman Schwartz, a distinguished American scholar and a perceptive student of post-communist constitutionalism, is fairly typical of the literature:

The performance of some of [the East European Constitutional] courts so far shows that despite the lack of a constitutional court tradition, men and women who don the robe of constitutional court judges can become courageous and vigorous defenders of constitutional principles and human rights, continuing the pattern shown elsewhere in the world.¹⁹

This is a heart-warming, feel-good story. It is a story about the courageous, principled, enlightened men and women of integrity who, notwithstanding the risks, take on the corrupt, ignorant, populist politicians. This is a story of the court as a noble “forum of principle” to be contrasted with the elected branches and their practices of horse-trading, political bargains and opportunistic deals. This is a story about a respect for paramount values, announced in a Constitution, but which are not for every mortal to be seen, as

¹⁸ Patricia M. Wald, Foreword, in Schwartz, *supra* note 1 at p. x. Wald, former Chief Judge of the US Court of Appeals for the District of Columbia, is member of the International Criminal Tribunal for the Former Yugoslavia.

¹⁹ Herman Schwartz, “The New East European Constitutional Courts”, in A. E. Dick Howard (ed.), *Constitution Making in Eastern Europe* (Washington, D.C.: Woodrow Wilson Center Press 1993), pp. 163-208 at p. 194. Another commentator, Spencer Zifcak, expressed his enthusiasm right in the title of his article “Hungary’s Remarkable, Radical, Constitutional Court”, *supra* note 12, and concluded his discussion of the Hungarian Court by saying that “[t]here have been few, more distinctive or valuable judicial contributions to emergent democracy anywhere”, *id.* at 56.

they often remain “invisible”.²⁰ The story is all the better since it is linked – as in the passage from Professor Schwartz – with a global story. The men and women who “don the robe of constitutional court judges” in Central and Eastern Europe are not alone. They belong to a small but distinguished community of constitutional judges around the world. And, consistently with “the pattern shown elsewhere in the world”, they will see to it that noble constitutionalism will prevail over dirty politics.

It is a nice story, but is it the whole story and is it an entirely accurate story? To be sure, among some of the most vocal opponents of constitutional tribunals in CEE were people like Presidents Lukashenka of Belarus or ex-President of Slovakia Meciar – not exactly paragons of democracy. But the nastiness of your opponents does not necessarily place you beyond criticism. For all the importance of the emergence and growth of post-communist constitutional courts, the phenomenon has remained strangely under-theorized. Constitutional review has been applauded, celebrated and embraced with enthusiasm by constitutional observers and actors, within and outside the region, but rarely have the difficult questions of democratic legitimacy of those tribunals been raised.

And yet, one would think that these questions must arise whenever an unelected body exercises the power of annulling the decisions of electorally accountable bodies in a democracy, and that the best strategy for the courts themselves would be to face the problems of legitimacy squarely and openly. After all, as Alec Stone Sweet proclaims in his recent book on four powerful constitutional courts in Western Europe: “When the court annuls a bill on rights grounds, it substitutes its own reading of rights, and its own policy goals, for those of the parliamentary majority”.²¹ This applies to Western *and* to Central/Eastern European courts alike, and not just to the annulments on “rights grounds” but also on the grounds of inconsistency with such general constitutional clauses as “social justice” or “democratic state based on law”. However, the implications of this statement for the democratic theory and practice of post-communist polities have rarely been articulated in the discourse on constitutional tribunals.

In particular, rarely have the vexed issues of political legitimacy, institutional competence, and possible infringements of the political rights of citizens been discussed. These three dimensions are, however, obviously invoked whenever the last word on issue of rights protection or policy-setting

²⁰ The concept of “invisible constitution” was coined by the (then) Chief Justice of the Hungarian Court, László Sólyom, see Sólyom & Brunner, *supra* note 2 at p. 41, see also Zifcak, *supra* note 12 at pp. 5-6.

²¹ Alec Stone Sweet, *Governing with Judges* (Oxford University Press 2000), at p. 105. Note that the phrase by Stone Sweet is not made in a critical context, and is not accompanied by an attempt to question the legitimacy of the “annulment” which is referred to in the quoted passage.

are placed in the hand of a body which is not accountable to the electorate in the way the parliaments (and governments controlled by the parliaments) are. Electorally accountable bodies, presumptively enjoy the paramount legitimate authority to decide on issues of policy on which the members of society disagree. The judiciary – including constitutional courts – is notoriously ill-equipped to evaluate options and choices on some issues, such as socio-economic policies with important financial implications. Finally, placing the protection of certain rights and other political values (such as “social justice”) in the hands of constitutional courts simultaneously removes these spheres from the agenda of the elected bodies, and consequently restricts the capacity of citizens to participate in political decisions which affect the contours of such rights or political values. While, in itself, this is not a conclusive argument against such an institutional transfer of competence, a reduction in the enjoyment of political rights of citizens calls for a strong defence for such an institutional arrangement.

No such defences have been forthcoming from constitutional discourse in CEE, and the unproblematic character of the constitutional review of laws as exercised by constitutional courts has been, more or less, taken for granted.²² It has been assumed that if there is an interpretative clash concerning constitutional rights between the parliament and the constitutional court, the parliament must be wrong and the court must be right. Somehow, it has become a conventional wisdom that a majority of judges of the constitutional court (which may be as few as five)²³ necessarily knows the “true” meaning of a constitutional right better than a majority of the parliamentary chamber. Consequently, the only significant critical voices about the institutional position of constitutional courts in post-communist systems have been that they are not powerful enough, not independent enough, not secure enough in the finality and enforceability of their judgements.

Why has the legitimacy of constitutional courts been taken for granted? Why have so few dissenting voices²⁴ arisen in the constitutional discourse of CEE?

²² E.g., with respect to the Constitutional Court of the Czech Republic, Pavel Holländer reports: “The scope of the Constitutional Court’s powers, as defined by the Constitution, is not subject of a discussion in legal theory”, “The Role of the Czech Constitutional Court: Application of the Constitution in Case Decisions of Ordinary Courts”, *Parker Sch. J.E.Eur. L.* 4 (1997), pp. 445-65 at p. 447.

²³ Constitutional Courts in Albania, Bosnia-Herzegovina, Lithuania, Macedonia, Romania and Slovenia have nine judges. Even smaller Courts exist in Moldova (6 judges) and Yugoslavia (7 judges).

²⁴ These exceptions include Stephen Holmes, “Back to the Drawing Board”, *East European Constitutional Review* 2 no. 1 (1993) pp. 21-25 (“To overlegitimate the [constitutional] court is to diminish the [parliamentary] assembly in the public’s eyes and to help discredit the nascent idea of representation through periodic elections”, id. at 23) and Andras Sajó, “Reading the Invisible Constitution: Judicial Review in Hungary”, *Oxford Journal of Legal Studies* 15 (1995) 253-67 and “How the Rule of Law Killed Hungarian Welfare Reform”,

One could perhaps be forgiven for offering simple answers formulated in terms of vested interests and institutional self-aggrandizement. After all, the constitutional discourses have been primarily produced by those who stand to gain the most from the theories supporting a strong role for constitutional courts: academic constitutional lawyers and constitutional judges themselves (the latter being largely drawn from the former). Self-congratulatory rhetoric supports both the position of the constitutional judiciary and law professors linked with each other in a symbiotic relationship. Strong constitutional review strengthens the status of academic constitutional lawyers (they get more material to work on – not just the text of constitutional acts but also the case law, and also may hope to be cited in the judgments and – the ultimate reward – find themselves one day on the bench), while the supportive doctrines produced by constitutional lawyers elevate the position of constitutional judges vis-à-vis political branches. Both phenomena are mutually sustaining.

Nothing in the preceding paragraph is restricted to CEE. Martin Shapiro has noted how the emergence and growth of constitutional review in Western Europe has affected favorably the fortunes of academic constitutional lawyers: “European constitutional law teachers went from the bottom of the pecking order of teachers of something like Freshman civics, to near the top of the order as constitutional judicial review came to flourish on the Continent. And just as that particular body of law made more of them, they made more of it”.²⁵

This shift has been recognized – though rarely – by Western European academic constitutional lawyers and judges, too. Bernhard Schlink, who combines both these professional roles, has caustically noted the relationship between the German Constitutional Court and the constitutional academia in his country: “*Karlsruhe locuta, causa finita* – this remark creates an image of this new situation, in which the *Bundesverfassungsgericht* speaks ex cathedra and representatives of dethroned constitutional scholarship stand at its feet”.²⁶ He further remarked that constitutional scholarship has adapted to the BVG “as a sort of junior partner”, and that many constitutional law professors have behaved “as loyal compilers and systematizers of [BVG’s] decisions, even as possible candidates for future positions on the Court... Constitutional scholarship would like to participate in power, and it realizes that the courtiers are rewarded for their service to the royal court by being allowed to influence

East European Constitutional Review 5 no. 1 (1993) pp. 31-41. The author of this Working Paper contributed several articles critical of the Polish Constitutional Tribunal and its powers in the opinion pages of Polish daily newspaper *Rzeczpospolita*.

²⁵ Martin Shapiro, “The Success of Judicial Review”, in Sally J. Kenney, William M. Reisinger & John C. Reitz (eds), *Constitutional Dialogues In Comparative Perspective* (London: Macmillan 1999), pp. 193-219 at p. 214. See also, similarly, Stone Sweet, *supra* note 21 at pp. 146-9.

²⁶ Bernhard Schlink, “German Constitutional Culture in Transition”, in Michel Rosenfeld (ed.), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Durham: Duke University Press, 1994), pp. 197-222 at p. 219.

it”.²⁷ It is significant that this mutually reinforcing relationship between the academic (mainly constitutional-law) community and the courts exercising constitutional review is a quasi-universal phenomenon, which can be ascertained not only in European legal systems but also in countries as remote from the continental model as Canada²⁸ or New Zealand.²⁹

There are, no doubt, also more profound reasons for the uncritical approaches to the constitutional courts in the region. The very high social standing of those courts, compared to other public institutions,³⁰ is a consequence of, and stands in contrast with, the general disenchantment with political branches of the government. Not unlike post-war Germany,³¹ “politics” was largely discredited after the fall of Communism, and there has been a widespread, cynical conviction that politics is a dirty business. Being novel institutions (with the exceptions of Poland and Yugoslavia), constitutional courts did not have to bear the same general opprobrium as those tainted by their complicity in non-democratic practices. Further, in at least some of post-communist countries (for instance, in Hungary), they were viewed by the then anti-communist, democratic opposition as one of very few institutional checks, agreed upon at the Round Table negotiations, upon the power of less-than-legitimate Parliament and government, dominated as they were by the Communists and their successor parties. Further, the two professional groups which provided the pool of candidates for judges of the constitutional courts – legal academics and the judiciary – were popularly regarded as less “compromised” than the “political class”. (Even though the latter was largely composed of the new people, the pervading cynicism and lack of trust in politicians inherited from the *ancien régime* affected all politicians during the transition). Notwithstanding that legal academics – and most of the justices of the post-communist Constitutional Courts have been law professors (in particular, constitutional law professors)³² – were among the most conformist in

²⁷ Id. p. 220.

²⁸ See F.L. Morton, “The Charter Revolution and the Court Party”, *Osgoode Hall Law Journal* 30 (1992) pp. 627-52 at pp. 641-2.

²⁹ James Allan notes that “there has been a good deal of encouragement for the judiciary from the academy when the courts give themselves more power [to review statutes] under the [Bill of Rights] Act [of 1990]”, James Allan, “The Effect of a Statutory Bill of Rights Where Parliament is Sovereign: the Lessons from New Zealand”, conference paper presented at the workshop “Sceptical Approaches to Entrenched Human Rights”, King’s College, London, 23 September 2000, at p.13 (footnotes omitted) (manuscript on file with the author).

³⁰ See, e.g., on Hungary, Halmai & Scheppele, *supra* note 4 at p. 181, Figure 1. In 1995 support for the Constitutional Court was 58 %, for the Parliament: 36 %, and for the Government, 35 %. For similar data in Slovakia and Czech Republic, see Schwartz, *supra* note 1 at p. 320 n. 22.

³¹ See Schlink, *supra* note 26 at p. 210-211.

³² For example, in Poland, by 1998 out of thirty-four judges of the Constitutional Tribunal, only seven had not been academics, see Schwartz *supra* note 1 at 261 n. 261. Bulgaria is the

academic circles of communist states, this fact has somehow not contaminated their reputation - perhaps due to a relatively high prestige enjoyed in Central Europe by academics generally. As for the judiciary, only few judges in the Communist era were directly involved in politically sensitive trials, and it would be correct to say that the bench was not held in disregard in most of the countries of the region - at least, compared to other public figures. It would be perhaps most realistic to say that the senior judiciary have been and remain relatively unknown figures (with few exceptions, such as a high-profile Chief Justice Valery Zorkin of the Russian Constitutional Court in years 1991-93), unburdened by any special liabilities related to their professional membership.

There is a broader reason for a relatively uncritical approach to constitutional courts within the post-communist world. While these courts (in any event, those operating in the most mature post-communist democratic systems) are essentially political institutions, engaged in a wide-ranging law- and policy-making, they can escape the social criticism endured by other political and legislative institutions thanks to their ability to draw upon the appearance of neutrality enjoyed by courts. The traditional paradigm of the judicial process is of a neutral umpire adjudicating between two parties and dispassionately dispensing justice. This description may fit contractual disputes but is a scarcely an apt description of courts seized on constitutional disputes. When engaged in abstract review, constitutional courts rather act as an additional legislative chamber which may, often on the basis of vague and eminently controversial constitutional pronouncements, strike down legislation enacted by another body, which is also committed to implementation of the same constitutional norms. (I will return to this point, at greater length, in Part II of this Working Paper). However, the paraphernalia of the judicial process - elaborate procedural requirements, the aura of reasoned debate, courtroom symbolism - create an air of majesty and dignity that other political institutions do not possess. The actual character of constitutional courts is substantially obscured by their very practices. The judicial costume lends an extra legitimacy and respectability to these institutions.

This is not to say that constitutional courts are indistinguishable from legislative bodies, but then, no two law-making bodies are identical either. In bicameral systems, the role of the second chamber is usually quite different from that of the "lower" one. For instance, in Poland, the role of the Sejm (the lower chamber of the Parliament) is significantly broader than that of the Senate.³³ These infirmities of the Senate do not render it non-legislative, and if

exception to this general rule, Interview with Professor Todor Todorov, Justice of the Constitutional Court of Bulgaria, Sofia 11 May 2001.

³³ It is only the Sejm that enacts statutes. The Senate can make amendments or reject the bill in its entirety but these decisions of the Senate can be overturned by the Sejm with an absolute majority. If the Senate does not express its views about a bill in the thirty days, the bill is considered to be adopted by the Parliament in its Sejm's version.

in someone's views they do, that would be an odd semantic convention. The same applies to Constitutional Courts. The fact that they operate under a number of restrictions to their law-making activity does not undermine *per se* their legislative character.

It is important to note, on the one hand, that there are important differences between these Courts and the paradigmatic judicial institutions, and on the other, that their part in lawmaking is informed by a number of constraints (differing from country to country) which do not apply to the parliament. For example, they operate under procedures which borrow greatly from courtroom procedure and symbolism in that they usually are not self-activated (but then, sometimes they are,³⁴ and in a system in which a large number of important laws are brought before the constitutional court for review, the significance of that distinction between the court and the legislature is greatly diminished anyway).³⁵ Further, they are more of a "negative" than "positive" legislator, to use a classical distinction by Hans Kelsen (but then, they sometimes issue affirmative pronouncements about the specific ways in which the defective laws have to be repaired, and in any event, the distinction between "positive" and "negative" is hard to draw).³⁶ Finally, they are compelled to argue in ways which use the structure of legal syllogism meaning, in effect, that when they wish to invalidate a law of which they disapprove, they must argue that it is inconsistent with their understanding of the Constitution - either a specific provision, or a more nebulous "constitutional value". Certain types of arguments in favor or against a given law which are available to the members of parliament (for example, about the degree of societal support for a proposed move) are normally not available to justices of the Constitutional Courts.

Much as these courts try to establish themselves (often, in good faith) as neutral interpreters of allegedly self-evident meaning of the constitution, commentators need not take these assurances at face value. The rejection of a judicial paradigm liberates commentators to ask questions about the legitimacy of constitutional courts' role in lawmaking and in the displacement of the will expressed by other institutions, notably, the parliaments. It is not that, at the end of the day, legitimacy is to be doubted on a simple basis of a lack of electoral pedigree. But if the role of the constitutional courts is to be maintained or even enhanced, their legitimacy has to be argued for, rather than simply assumed.

The absence of such a reflection in the post-communist settings is all the more striking once one considers the debates in Western liberal democracies about the limits and justifications of judicial constitutional review. The gap is

³⁴ Constitutional Courts in Hungary and Poland (though only in exceptional circumstances) can act on their own initiative.

³⁵ See, similarly, Michel Troper, "Le bon usage des spectres: Du gouvernement des juges au gouvernement par les juges" (2000, unpublished manuscript on file with the author) at pp. 17-18.

³⁶ See *id.* at p. 18.

puzzling. An institution has been straightforwardly imported into post-communist systems from the West but the ideological and theoretical controversy surrounding that institution has not. If there has been a degree of angst caused by activities of the constitutional courts in the countries which served as models to new democracies, then there is no reason to refuse to ask similar questions with respect to their progeny.

To be sure, the longest and the deepest habit of challenging active constitutional review has developed in the country which influenced the establishment and development of Constitutional Courts in CEE to a very modest degree, namely, the United States. A tradition of doctrinal and judicial warnings about the dangers of enthusiastic judicial lawmaking has been famously punctuated by, among other things, James Thayer's influential essay of 1893 calling for judicial restraint in the name of the goal of self-government, Alexander Bickel's celebration of "passive virtues" that the Court displays in avoiding the excessive exercise of its reviewing powers, John Hart Ely's defense of judicial review only insofar as it remedies political malfunctions of representative democracy, and – most recently – Cass Sunstein's plea for "judicial minimalism".³⁷ The very title of a recent book by Mark Tushnet – *Taking the Constitution Away from the Courts*³⁸ – expresses well the strength of a doctrinal challenge to the principle of judicial supremacy and finality of judicial articulation of constitutional norms. Tushnet calls for a "populist" constitutional law in which the courts (including the Supreme Court of the United States) will not occupy any privileged position – vis-à-vis political branches – in authoritative pronouncements about the meaning of the Constitutional provisions.

It is not only the commentators but also the judges themselves who have long been reminding themselves of the requirements for proper deference to democratically elected bodies, and for recognizing the presumption of constitutionality of statutes. Even if these reminders have often been only rhetorical, and if they served often as a disguise for activism, the very fact that the Supreme Court's justices have felt a need to justify themselves in that way is significant. But often the argument about the proper respective roles of the legislature and the Court served as a justifying reason for refusing to invalidate the legislation, as, for instance, in the decision refusing to invalidate legislation prohibiting doctor-assisted suicide, the Supreme Court declared: "By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.

³⁷ James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law", *Harvard Law Review* 7 (1893) pp. 129-56; Alexander M. Bickel, *The Least Dangerous Branch* (New Haven: Yale University Press 1962); John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press 1980); Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press 1999).

³⁸ Princeton: Princeton University Press 1999.

We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field'....".³⁹

A similarly skeptical attitude towards activist judicial review has been articulated by many observers of the Canadian Supreme Court after thoroughgoing, rights based review was instituted there with the entrenchment of the Charter of Rights and Freedoms in 1982. As one legal scholar notes: "Over the two decades that judges have given concrete meaning to abstract rights, celebration of constitutional rights has turned to scepticism and the institutional legitimacy of the courts has been threatened".⁴⁰ This, one should emphasize, is not the only attitude to the rights review that is registered in academic or political circles in Canada, and it should be also noted that the public prestige of the Supreme Court among the Canadian population is very high. Still, interestingly, a 1999 survey showed that the Canadians were divided evenly on the proposition that "the right of the Supreme Court to decide certain controversial issues should be reduced".⁴¹ The issue of the institutional competence of the Court, and its legitimacy to strike down laws adopted by the state and federal parliaments is certainly on the agenda in Canada. Its sharpness is perhaps somewhat weakened by (theoretical at least) availability of the "notwithstanding" clause of the Charter which allows the parliaments to enact a particular measure, notwithstanding its possible inconsistency with the Charter rights. The clause, however, has been rather conspicuous by its non-use (with a few exceptions, relating mainly to the special issue of Quebec), and it has not been generally a great success in the academic writings or in the community at large as an example of a compromise between parliamentary supremacy and judicial review.⁴²

In contrast to the Supreme Court of the United States (and, *mutatis mutandis*, the highest appellate courts of Canada and Australia), European constitutional adjudication has *not* developed a tradition of self-doubt, agonizing, and "exercising the utmost care" whenever "breaking new ground" in constitutional matters. This may be due to a number of factors. For one thing, there is a much stronger tradition and habit of deference to the highest bodies of government (and this includes the judicial branch) in Western Europe than in the United States. More importantly, constitutional adjudication, in an abstract

³⁹ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (quoting *Collins v. Harher Heights*, 503 U.S. 115, 125 (1992)).

⁴⁰ Judy Fudge, "The Canadian Charter of Rights: Recognition, Redistribution and the Imperialism of the Courts", conference paper presented at the workshop "Sceptical Approaches to Entrenched Human Rights", King's College, London, 23 September 2000, at p. 1, reference omitted (manuscript on file with the author).

⁴¹ *Id.* at p. 2.

⁴² One commentator even suggests that, except for the French-speaking majority in Quebec, the notwithstanding clause "has now . . . generally assumed the mantle of being constitutionally illegitimate", Janet L. Hiebert, *Limiting Rights* (Montreal: McGill-Queens University Press 1996) at p. 139.

form, has been introduced explicitly in the Constitutions, rather than implicitly and only by the doctrine developed by the court itself, as was the case of the United States.⁴³ Continental constitutional courts do not, therefore, feel any special reasons for anxiety about its legitimacy when deciding about the constitutionality of statutes. The general constitutional design of these institutions locates them in a special position, not comparable to that of ordinary courts. An American observer is right to note that "German, French, and other continental constitutional tribunals have neither hesitated nor apologized when issuing wide-ranging decisions on basic constitutional issues, often drawing on unwritten or historical principles and values".⁴⁴

But one should not overstate that point. While the strength and the vigour of criticism of constitutional courts is nowhere near as formidable in Western Europe as in the United States, it is not quite absent. The critique by Schlink, referred to above, is one example.⁴⁵ Similarly, consider France⁴⁶ where the tradition of warning against "*le gouvernement des juges*" well precedes the establishment of the *Conseil constitutionnel* and goes back to a 1921 book by Edouard Lambert who addressed his criticism to the US Supreme Court's role.⁴⁷ More recently, Bernard Chantebout concluded that the power of constitutional interpretation is by its very nature political, and that "it raises a problem of the compatibility of constitutional review with democracy".⁴⁸ Earlier, in an

⁴³ This contrast is not as sharp as this sentence suggests, regarding, for instance, France, where the dramatic extension of the authority of the Constitutional Council was a result of decisions of the Council itself rather than of a prior constitutional design. In a watershed decision of 1971, the Council "incorporated" the set of unwritten principles into a constitutional package (known by the doctrine as *le bloc de constitutionnalité* on the basis of which the constitutional review of laws is conducted). The Council did it by announcing its reliance on, among other things, "*les principes fondamentaux reconnus par le lois de la République*" (*P.F.R.L.R.*) [Fundamental Principles of the Laws of the Republic] even though the *P.F.R.L.R.* were not even mentioned by the Constitution in force (of 1958) at the time, much less specified. However, the Council gave legal weight to the (unenumerated) *P.F.R.L.R.* because they were mentioned in the Preamble to the 1946 Constitution which, in turn, was mentioned by the Preamble to the 1958 Constitution. These principles, the value of which was found to be equal to those of the Declaration of Rights of Man and Citizen of 1789, were said to be discernible (by the Council itself, naturally) in the legislation in place up to the fall of the republican system in France, i.e. up to July 1948. See Georges Burdeau, Francis Hamon & Michel Troper, *Droit constitutionnel*, vol. 26 (Paris: L.G.D.J. 1999) at pp. 714-15.

⁴⁴ H. Schwartz, *supra* note 19 at p. 165, footnote omitted.

⁴⁵ See text accompanying footnotes 26-27.

⁴⁶ I am grateful to Michel Troper for his information and opinion about the French tradition of concern about "*le gouvernement des juges*".

⁴⁷ Edouard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux Etats-Unis: l'expérience américaine du contrôle judiciaire de la constitutionnalité des lois* (Paris: Giard 1921).

⁴⁸ Bernard Chantebout, *Droit constitutionnel et science politique* (Paris: A Colin 1997), at p. 60, quoted by Troper, *supra* note 35 at p. 8 [The translation of this, and the following, passages from French are mine – WS].

impassioned article, René de Lacharrière argued that review of constitutionality has no constitutional basis in France, and went on to say, with sarcasm, of the concept of “*le gouvernement des juges*” that

[i]t is in reality neither a government nor the judges but something much better: a supreme censure which, without giving any traditional guarantees provided by a high jurisdiction, and while usurping the powers which are not allocated to it by constitutional texts or even are explicitly denied, dominates from now our entire political edifice.⁴⁹

He also laments that the “enterprise of the *Conseil constitutionnel*” provides an extreme illustration of a “divorce that occurred between the French people and their politics” and that the only remedy is to “reintroduce . . . a little more of real democracy to our institutions”.⁵⁰

But is it legitimate to draw an analogy between the Constitutional Courts in transitional states and those in more “developed” and “mature” systems, and to replicate the arguments about the proper judicial role forged in those more mature systems? It is sometimes claimed that such an extrapolation is unjustified and that the relevant differences between the states which have only just emerged from authoritarianism and those in established democracies should lead us to suspend criticisms of strong judicial review which would otherwise be justified in the West. A careful student of post-communist legal transformation, Ruti Teitel, suggests that the usual doubts about the legitimacy of judicial lawmaking simply do not apply to transitional legal environment: “Our ordinary intuitions about the nature and role of adjudication relate to presumptions about the relative competence and capacities of judiciaries and legislatures in ordinary times that simply do not hold in unstable periods. . . . In periods of political change, the very concerns for legitimacy and democracy that ordinarily constrain activist adjudication may well support such adjudication as an alternative to more politicized uses of the law”.⁵¹

In contrast to Teitel, I believe that there *are* good reasons to resist reliance on exceptionalism of transitional states as a means to suspend the objections which we might have elsewhere to the institutional anomalies. As the post-communist states of CEE become more mature and stable, so the objections against judicial lawmaking which are pertinent elsewhere in the democratic world apply with equal force to CEE. In particular, there is little or no reason to suspend “our ordinary intuitions” about democracy and legitimacy with respect to countries such as Hungary, Poland or Slovenia, the very

⁴⁹ René de Lacharrière, “Opinion dissidente”, *Pouvoir* 13 (1980), pp. 132-150, at p. 139.

⁵⁰ *Id.*, at p. 150.

⁵¹ Ruti Teitel, “Transitional Jurisprudence: The Role of Law in Political Transformation”, *Yale Law Journal* 106 (1997), pp. 2009-2080 at p. 2034.

countries where the constitutional courts are particularly activist. In many relevant respects these states fully resemble mature democracies, exhibiting as they do developed and pluralistic party systems, free and diverse press, well-educated and politically aware electorates and independent judiciaries etc.

Moreover, there would be a certain irony in the use of exceptionalism to defend the role of the activist constitutional courts since some of the most activist courts themselves actually refer to the "normalcy" of the democratic systems in which they operate to justify some of their most activist decisions. The rhetoric of transition and extraordinariness is actually strongly resisted by the constitutional courts themselves. In an important decision of December 1994 declaring the "lustration" law (vetting of political figures) unconstitutional on various grounds, the Hungarian Constitutional Court relied partly on an argument that a successful transition to a democratic system has actually occurred without a need to change the personnel through a lustration; the upshot was that the alleged purpose of the challenged law (namely, to secure a successful transition) could not apply. The principles to be applied to assess the lustration provisions had therefore to be those applicable to a democratic state based on a principle of rule of law. The Court drew a clear contrast between the past and the present, separated as they are by "the transition as a historical fact".⁵² It made clear that the lawfulness of the "lustration" laws should be judged not by reference to unusual circumstances of transition but rather by appeal to balancing of the rights and interests at issue.

If anything, some of the Courts in CEE use (at least rhetorically) the argument from transitionalism to *strengthen* the idea of deference to legislatures rather than for the purpose of self-reinforcement. The Constitutional Tribunal of Poland, when emphasising that it conducts the control of *legality* and not of *wisdom* of the statutes, has been asserting that the legislator should have a broad discretion in deciding about the measures to adopt in order to fit the announced purposes. This principle, the Court has been occasionally saying, is *particularly important* in the periods of major systemic transformations, since transition "from the authoritarian state to the state of law may exceptionally take forms which would be unjustified under normal conditions".⁵³ Of course it remains to be seen whether the Court practised what it preached, and whether a distinction between legality and substantial wisdom of the law can be drawn. If the legality is a matter of conformity with broadly formulated, value-laden constitutional pronouncements, such line is not only difficult to draw in practice but, more fundamentally, chimerical as a matter of general principle. But the point is that the Constitutional Courts themselves either resist the rhetoric of exceptionalism, or, when they use it, apply it to opposite purposes to those of Teitel.

⁵² Decision no. 60/1994 of 24 December 1994, reprinted in Sólyom & Brunner, *supra* note 2 at p. 312.

⁵³ Decision K 121/93 at 361.

Apart from anything else, exceptionalist arguments resonate with the attitude that Central and Eastern European societies are as yet too immature for democracy.⁵⁴ As an example of such arguably patronizing attitudes, consider the views of John Gray who believes that democratic institutions are not well suited to post-communist societies, and that – at least to many of them, including Russia – “authoritarian political institutions, buttressed by indigenous cultural traditions, seem to offer the best matrix for the emergent civil society”.⁵⁵ Gray’s prescription is largely based on his diagnosis that a decisive role in shaping the political life in these societies is played by pre-Communist traditions which are “hardly those of Western liberal democracy”.⁵⁶ But there are three problems with his prescription of “authoritarianism plus free markets”, *based on that particular diagnosis*. First, at least some of these societies had a pre-Communist past not less democratic than pre-World War II systems of many Western European societies which now have unimpeachable democratic credentials. Second, the democratic aspirations of peoples in countries of the region have been greatly influenced by the universal rise of democratic beliefs in recent decades – so that the explanatory power of the pre-Communist past has now a very limited application. Third, the prescription of authoritarianism may be a self-fulfilling prophecy if the policies of the West are shaped by it. This would be a truly regrettable effect of Gray’s prescription.

As an aside, we may note that the exceptionalism of post-communist states has been used also for an opposite purpose to that mentioned above - not to mitigate our common misgivings about strong judicial role but to amplify them. Writing about Hungarian constitutionalism, Andrew Arato remarks: “[J]udicial review does raise problems from the point of view of democratic legitimacy in a normally functioning liberal democracy. These problems, moreover, are inevitably exacerbated by the unavoidable activism in the context defined by *the weak democratic legitimacy of the constitutional document*”.⁵⁷ But this point has a very limited application. Hungary provides the only example of a post-communist state having a constitution adopted by a non-democratically elected parliament.

⁵⁴ I should emphasize that I am not attributing such an attitude to Ruti Teitel.

⁵⁵ John Gray, “From Post-Communism to Civil Society: The Reemergence of History and the Decline of the Western Model”, *Social Philosophy and Policy* (1993), pp. 26-50 at p. 46.

⁵⁶ *Id.* at p. 27.

⁵⁷ Andrew Arato, “Constitution and Continuity in the Eastern European Transitions: The Hungarian Case (part two)”, in Irena Grudzińska Gross (ed.), *Constitutionalism & Politics* (Bratislava: Slovak Committee of the European Cultural Foundation 1994), pp. 271-88 at p. 274, emphasis in the original, footnote omitted.

III. Constitutional courts between the judicial and the legislative branch

As suggested earlier, it is clear that the constitutional courts in the region discussed here enjoy a high level of social acceptance and recognition, despite occasional disagreements and criticisms of their particular decisions. They do not therefore have a problem of “legitimacy” in the sense of general public acceptance of their authority to do what they are doing – including, to overturn statutes. Further, these courts do not have a problem of legitimacy in the formal and institutional sense of the term, which may be understood as compliance with the constitutionally recognized limits and working under constitutionally defined standards. They do not, as a matter of routine, exceed the powers granted to them by the respective constitutions, by the statutes on Constitutional Courts or by other relevant laws of their respective jurisdictions. Even if one disagrees, on merits, with this or that decision, one must be careful not to frame the criticism in terms of a charge that the court acted *ultra vires*. A charge that a court decides on the (allegedly improper) grounds of the political or moral preferences of its judges as opposed to the (allegedly proper) grounds of inconsistency with the Constitution is a statement which reflects, rather than stands outside of, the substantive disagreement as to the wisdom, or otherwise, of a particular decision. Whether the court’s decisions are genuinely based on constitutional principles rather than the judges’ own policies and moral values is in itself a controversial matter, and the level of this controversy is no different from the controversy of the wisdom (or otherwise) of any other political decisions.

And yet, from the mere fact that the Court remains *intra vires* and does not violate the formal, institutional rules of legitimacy of its decisions, it does not follow that the Court’s actions are unproblematic from the point of view of legitimacy in a broader, critical sense of the word. The question then becomes *not*: “Is the Court authorized to take this type of decisions” but rather “*Should* the Court be authorized to take them?”

The question of the *democratic* legitimacy of an institution is not exhausted by the fact that the institution acts within the constitutionally established limits and that the constitution itself has been enacted democratically. There is no contradiction in terms if one claims that a constitutionally established device is undemocratic.⁵⁸ It is a commonplace that a democratic procedure for establishing an institution does not necessarily confer a democratic character on the institution itself. A democratically constituted constitutional convention, proceeding in a democratic manner may decide to establish a non-democratic, or imperfectly democratic, institution. The degree of democracy that the constitutional convention wishes to infuse into the

⁵⁸ See Jeremy Waldron, “Precommitment and Disagreement”, in Larry Alexander, ed., *Constitutionalism: Philosophical Foundations* (Cambridge University Press, Cambridge 1998), pp. 272-73.

institutions that it is about to set in motion is in itself a matter of free choice if the convention is to be truly democratic.

Just as there is no necessary connection between a democratic procedure of setting up an institution and a democratic character of that institution, so there is no necessary connection between the *undemocratic* nature of an institution and its legitimacy (even in a broader, critical sense of the word). A central bank, a civil aviation authority, the army or a national opera company are not “democratic” institutions (not just in the sense of internal decision-making process but, more importantly here, in that their specific acts, or sometimes even the entire strings of acts, do not track the actual distribution of social preferences) but this does not render them illegitimate. More relevantly for our purposes, ordinary courts are not, and are not meant to be, democratic institutions and yet, in itself, it does not affect adversely their legitimacy. The main source of their legitimacy, as Martin Shapiro famously argued in his classic study on courts, derives from the “triadic” model in which two persons decide to call upon a third, neutral umpire, in order to resolve their disagreement. Shapiro argued further that “the substitution of law and office for consent” which distinguishes courts *par excellence* from go-betweens, mediators and arbitrators, introduces an important tension between the social logic of a triad (which is a source of a legitimacy of the court) and the actual operations of the court.⁵⁹ In particular, Shapiro argues that the courts’ involvement in public law, their exercise of social control and their lawmaking functions importantly weaken their triadic, legitimizing structure. And yet, it is Shapiro’s thesis that courts, as we know them, are not qualitatively different from more triadic institutions (such as mediators): they “are simply at one end of the spectrum rather than constituting an absolutely distinct entity.”⁶⁰ The need to elicit some remnants of consent (revealed, for instance, by courts’ reluctance to decide in the absence of one of the parties), their frequent pursuit of a compromise, and many other mediating components in judging, render them just a species of a broader family of triadic institutions.

It is important not to overstate Shapiro’s point: much of his argument is devoted to showing that the traditional “prototype of courts” is not reflected in the actual operations of judicial bodies. And yet, it is important to retain his general conclusion that it is precisely the departure from the triadic structure that is a source of possible weaknesses of judicial legitimacy. “[F]rom [the triad’s] overwhelming appeal to common sense stems the basic political legitimacy of courts everywhere,”⁶¹ asserts Shapiro, but “[c]ontemporary courts are involved in a permanent crisis because they have moved very far

⁵⁹ Martin Shapiro, *Courts: A Comparative and Political Analysis* (University of Chicago Press, Chicago 1981), chapter 1.

⁶⁰ *Id.*, p. 8.

⁶¹ *Id.*, p. 1.

along the routes of law and office from the basic consensual triad that provides their essential social logic.”⁶²

This tension between courts’ claim to legitimacy and their non-triadic patterns of operation, is further magnified when the procedure abandons all pretenses to adjudication of conflicting interests between two parties, and focuses instead on an abstract scrutiny of a legal text. If the scrutiny is unrelated to any particular conflict between two parties, the “triadic” sources of legitimacy of courts disappear altogether. This is the predicament faced by those constitutional courts whose functions include abstract judicial review. One could perhaps try to argue that a remnant of the triadic structure is there: there is a complainant (usually, the outvoted parliamentary minority, or the President), a respondent (the representatives of the parliamentary majority, or of the government), and a neutral umpire: the Constitutional Court. But this analogy is not apposite. The “triad” which underpins the prototype of courts is not constituted by two parties disagreeing about what social norms should be properly enforced in law, and a third party who resolves their dispute, which is the situation of constitutional courts’ adjudication. The conflict which is the stuff of a triadic judicial resolution revolves not around abstract ideas concerning rights but about the claim that one party’s interests have been violated by another, under the existing valid rules. A better analogy to the conflict which lies at the heart of abstract judicial review is to the disagreement between a majority and the opposition about what law or policy is best for the society, under general and indeterminate constitutional provisions. Indeed, this is precisely what is at stake in the discourse within the abstract constitutional review of legislation. And in *this* discourse, the Constitutional Court is unable to rely on the argument that all it is doing is *applying* the existing law because it is precisely the rightness (under general constitutional standards) of the new law which is the subject of the controversy. As Jürgen Habermas has observed, “[t]he legitimating reasons available from the constitution are given to the Constitutional Court in advance from the perspective of the application of law – and not from the perspective of a legislation that elaborates and *develops* the system of rights in the pursuit of policies.”⁶³

While the court-based legitimacy seems hardly applicable to abstract review, one can think of different types of democratic legitimacy that might support courts’ authority to invalidate statutes. It is not unthinkable, and certainly not patently absurd, that a sort of “third chamber” (or a second chamber, in unicameral parliamentary systems) endowed with a task of taking another look at the bill, this time from a narrower point of view of constitutional values, can be given a justification based upon the general principles of democratic legitimacy. A combination of a long tenure, immunization from

⁶² *Id.*, p. 8.

⁶³ Jürgen Habermas, *Between Facts and Norms*, trans. William Rehg (Polity Press, Cambridge 1996), p. 262, emphasis in original.

direct societal pressures and from temptations connecting with seeking re-election, on the one hand, with a degree of electoral pedigree (after all, judges of constitutional courts are appointed almost always by democratically answerable bodies), on the other, may be just the right mix to combine a good democratic mandate with the institutional incentives for a serious, principle-based review required from a “negative legislator”. If what worries us (as it should) is a matter of democratic mandate of a negative legislator, then this concern may be (partly, at least) met by the fact that members of constitutional courts are much more democratically appointed than ordinary judges. Indeed, one could make an argument that a constitutional court is an indirectly elected democratic (or near-democratic) “chamber of reflection”, the purpose of which is to reconsider the bill in a more dispassionate manner, removed one step further from specific political controversies. This immunization from the passions of the moment need not necessarily deprive the constitutional court’s task of its representative character: one may, for example, charge the court with the task of identifying (and giving effect to) whatever consensus can be found on a given issue (which has a bearing on constitutional interpretation) *in the light of* (rather than in isolation from) the actual, current moral and political views in the community. One can even appeal to Rawlsian idea of “overlapping consensus” as a proper device upon which a constitutional tribunal should base its representative function.⁶⁴

It is not my claim that such an argument is compelling. As a matter of fact, I do not think it is. To see why not, consider this typical statement from a proponent of the idea of representative functions of the US Supreme Court: “Without surrendering its prerogatives of judgment or compromising its obligation to uphold constitutional values in the face of political opposition, the Court, in specifying the meaning of constitutional principles, must be accountable at least in part to manifestations of reasonable moral and political commitments displayed by the citizenry, both nationally and locally”.⁶⁵ For one thing, there is an apparent possibility of tension between the obligations proclaimed in the first and in the second parts of the sentence. What if “citizens’ commitments” clash with “constitutional values” as understood by the justices?

Second, the proviso that the only commitments which the Court must respect are the “reasonable” ones opens the gate to a number of “filtering devices” which will transform the actual conventional morality into something hardly recognizable by the citizenry.⁶⁶ Finally, an idea that the Court must be accountable to “commitments” rather than to the citizens themselves strikes me

⁶⁴ For such a conception of role of the Supreme Court of the United States, see Richard H. Fallon, “The Supreme Court, 1996 Term – Foreword: Implementing the Constitution”, *Harvard Law Review* 111 (1997): 54-152, pp. 144-145.

⁶⁵ Id. at p. 145, footnotes omitted, emphasis in the original.

⁶⁶ See, generally, Wojciech Sadurski, “Conventional Morality and Judicial Standards”, *Virginia Law Review* 73 (1987): 339-97.

as fanciful. Accountability presupposes a possibility of censuring the agent by the principal - how can "commitments" do it? And yet the choice of words is not incidental because, naturally, there is no way in which the justices of the US Supreme Court (or any other court, for that matter) can be "accountable" to the citizens in the ordinary sense of the word.

Furthermore, an "overlapping consensus"-based rationale would generate a number of more practical questions: if we need a "negative legislator" whose task would be to test the bill from the point of view of constitutional mandate, should it be composed exactly in the way that the actually-existing Constitutional Courts are composed? Why should its composition be limited to lawyers only - after all, legal skills are not decisive (and not the *only* relevant ones) for articulating the specific meaning of broad, value-based constitutional pronouncements? (This had been recognized in the design of at least one constitutional court outside CEE, namely the French *Conseil constitutionnel*, the members of which do not have to have, and it actually happens that they do not have, any formal legal qualifications). These are important questions but will not be pursued here. The only point being made is that a construal of constitutional courts as part of an institutional system of law-making is not incoherent and does not seem to raise impossible problems in supplying their democratic legitimacy. Certainly, the prospect of finding legitimating arguments for abstract review in terms of traditional representative democracy seems to be more promising than in terms of judicial function.

The paradox is that the constitutional courts themselves, and their most fervent doctrinal supporters, usually strenuously resist the characterization of their position in the political system as a second or third legislative chamber, and construct their own self-perception as "courts", albeit somewhat different than the "ordinary" courts. There has been a controversy among the constitutional lawyers of CEE as to whether Constitutional Courts should be classified as within the judiciary or as a *sui generis* bodies. Further, the actual location of the provisions on the Constitutional Court in the structure of the respective constitutions varies somewhat from country to country. For example, in Slovakia the Constitutional Court is regulated in that part of the Constitution devoted to "[t]he judicial power"⁶⁷ and is characterized *inter alia* as "an independent judicial authority".⁶⁸ Similarly, the constitutional courts in Russia and in the Czech Republic are regulated in separate chapters while in Poland, the Constitutional Tribunal is regulated in the chapter generally entitled "Courts and Tribunals" but with its own subchapter. (But then, the Polish statute on the Constitutional Tribunal explicitly states, in its first article, that the Tribunal is a judicial body). By contrast, several other constitutions include provisions on constitutional courts in separate chapters or parts altogether, without including

⁶⁷ Part 7 of the Constitution of the Slovak Republic.

⁶⁸ Article 124 of the Constitution of the Slovak Republic.

them in any broader subdivisions. For example, in Croatia the chapter on the Constitutional Court comes between chapters on “judicial power” and local administration, in Lithuania between the chapters on the Government and the Courts and in Hungary between the chapters on the President and the Ombudsman, etc. The approaches in these countries ranged between pigeon-holing Constitutional Courts in the “judicial” branch (which seems to be the dominant practice)⁶⁹ and characterizing it as a *sui generis* institution which is arguably an avoidance of a characterization. For instance, the author of a chapter in the fundamental treatise on Polish constitution who is a Constitutional Court judge himself, Professor Janusz Trzcinski concludes that “the functioning of the CT [Constitutional Tribunal], as determined by the Constitution and by the Law on the CT, does not fit the accepted classifications [of branches of government into legislative, executive and judicial].”⁷⁰ To my knowledge, there have not been any strongly expressed views within the mainstream constitutional doctrine in the region (and certainly not by any of the Constitutional Courts concerned) that constitutional courts, when exercising abstract judicial review, belong to the *legislative* branch of the state.

The self-perception of those courts as part of the judiciary, broadly speaking, has been also endorsed by some friendly commentators from the outside of the region. Owen Fiss announced: “In the new democracies of the East . . . the judiciary . . . must give life and force to the idea of a constitutional court . . . [to] convince their fellow citizens that law is distinct from politics, and that they are entitled to decide what the law is.”⁷¹ The characterization of constitutional courts *qua* courts is implicit in Ruti Teitel’s view that the power of overriding the Constitutional Tribunal’s decision by the Parliament in Poland (before the adoption of the 1997 Constitution) was a case of mixing judicial and legislative powers, and evidence that “the understanding of separation of powers is far from entrenched in the region.”⁷² The image is of a legislative body (the Parliament) intruding upon the functions of a judicial body (the Tribunal).

It may seem ironic that the doctrine which would offer perhaps the most promising path of legitimating the Courts in their exercise of abstract constitutional review is most decisively resisted by the Courts themselves, while the doctrine which is patently unsuited to provide such legitimacy is the one

⁶⁹ See Zdzisław Czeszejko-Sochacki, Leszek Garlicki & Janusz Trzcinski, *Komentarz do Ustawy o Trybunale Konstytucyjnym* (Wydawnictwo Sejmowe, Warszawa 1999), p. 8 who state that, in Poland, the majority of authors consider the Constitutional Tribunal as belonging to the judicial branch.

⁷⁰ Leszek Garlicki, ed., *Konstytucja Rzeczypospolitej Polskiej: Komentarz* (Wydawnictwo Sejmowe, Warszawa 1999), chapter 8, p. 10.

⁷¹ Owen Fiss, “Introductory Remarks, Symposium”, 19 *Yale J. Int. L.* 219 (1994).

⁷² Ruti Teitel, “Post-Communist Constitutionalism: A Transitional Perspective”, *Columbia Human Rights Law Review* 26 (1994): 167-190, p. 178.

most zealously defended by those Courts and their apologists. But the paradox, is of course, illusory. If one adopts a “third chamber” perspective on the exercise of abstract constitutional review, there is no justification whatsoever to stick to the current composition of the Courts consisting, as they are, of lawyers only. Decisions about death penalty, abortion, defamation of public officials, etc. may be dressed in a legal garb but they ultimately hinge upon fundamental value choices on making of which legal education has no bearing whatsoever. The fact that it is the Constitution rather than a non-textual moral or political theory which forms the direct basis for a scrutiny of a given law is no good reason to restrict the range of scrutinizers to lawyers. After all, what constitutional review in such cases is about is not the detection of a “true” legal meaning of such constitutional concepts as the right to life, privacy or freedom of speech but rather a decision about what cluster of values is preferable to others in the articulation of a vague constitutional formula with reference to a specific problem unaddressed in a determinate fashion by a constitutional text. It is precisely *because* the issue is a choice of a cluster of values rather than an exegesis of the legal concept that a representative task of the scrutinizers is being called for. But, at the same time, for that very same reason no necessary connection exists between legal qualifications of scrutinizers and the nature of scrutiny, and that is why the democratic legitimacy of Constitutional Courts, as they are constituted, is continually called into question.

And it will not do to attempt to legitimize the existing Constitutional Courts by pointing at less-than-perfect legitimacy of parliaments. “The conventional concern of the absence of democratic accountability posed by judicial lawmaking seems less apt in periods of political flux. In such periods, the transitional legislature frequently is not freely elected and, further, lacks the experience and legitimacy of the legislature operating in ordinary times.”⁷³ Ruti Teitel makes this observation as a response to the charge of the lack of legitimacy of constitutional courts, in particular, in post-Communist transition. But the observation about the legislatures not being freely elected applies to some of the legislatures in the region only (for example, only to the post-Round Table election in Poland in June 1989): usually, only to the first term of legislatures after the transition. This observation has, therefore, now only historical value. In those countries where the freedom and fairness of election of legislatures is questionable (Belarus), the problem of “activist” Constitutional Courts does not arise in the first place. In turn, the most activist Constitutional Courts operate alongside the fully mature, freely elected legislatures. Their “experience” may be put in doubt (but so may be the experience of new constitutional courts) but the remark about their “lack of legitimacy” is question begging. Anyway, even if the legitimacy of the parliaments is less than perfect,

⁷³ Teitel, *supra* note 51 at p. 2033 (footnote omitted).

surely the remedy is not to supplant part of their power by the bodies which have *even less* legitimacy to create law and determine policies.

IV. The question of judicial activism⁷⁴

How “activist” are the most dynamic constitutional courts in CEE? Is the judicial activity of these courts significantly altering the preferences of the parliamentary majorities, and – more importantly – departing from the views of the constitution makers? Elsewhere (especially in the United States) a reliance on the “original intent” in the area of constitutional interpretation is largely – and deservedly – in disrepute, but when the constitution is brand new and the constitution makers are still very much around, the hostility to the very idea of the original intent is less understandable. After all, it is the constitution which provides the basis of legitimacy of the constitutional courts’ decision making.

It is difficult to establish what the criteria of “judicial activism” should be, and the concept itself is suspect to many legal scholars, but we do not need to get embroiled in the controversy about the term. What *is* important is that the phenomenon which it is supposed to denote here is substantial and raises understandable concerns, namely, a substitution of the parliamentary majority’s view by the court’s majority view about the proper articulation of the meaning of a constitutional right when these two views collide. As a working test, I suggest that an inquiry into “judicial activism” of constitutional courts involves two criteria: the importance of the laws invalidated under the rights provisions and the nature of the reasoning leading to such invalidation.

As far as the first criterion is concerned, the relative importance of a norm is admittedly in the eyes of beholder, and whether a rule which has been struck down is relatively significant or relatively trivial, is a matter which cannot be ascertained in a non-controversial fashion. When, for example, the Estonian Chamber of Constitutional Review struck down Tallin city regulations concerning the removal of illegally parked vehicles,⁷⁵ some will probably say that this is a relatively trivial matter, in the broader scheme of things. Others will look at the decision more closely and, having ascertained that the conclusion has been reached under an interpretation of the right to private property, will conclude that it posits a fundamental and potentially far-reaching principle of demarcating individual autonomy and the state’s police power.

At the end of the day, what matters for the characterisation of the courts as “activist” is not so much a proportion of relatively “trivial” matters decided by these courts but rather the very fact that, even if very rarely, some truly

⁷⁴ This part of my working paper roughly follows the argument put forward in Wojciech Sadurski, “Rights-Based Constitutional Review in Central and Eastern Europe”, in Tom Campbell, Keith Ewing & Adam Tomkins, eds, *Sceptical Essays on Human Rights* (Oxford University Press, 2001, forthcoming).

⁷⁵ See *East European Case Reporter of Constitutional Law* 3 (1996), no. 1.

fundamental political choices on central public issues have been reversed by the Courts. And there is little reasonable disagreement that some of the Central European constitutional courts have, at least occasionally, displaced the parliament's will on fundamental matters.

What follows is a rather random list of examples. The laws invalidated (or partly invalidated, but with significant effects on the original laws) included rights to abortion (Poland, Hungary), the death penalty (Hungary, Lithuania, Albania, Ukraine – in all these countries the abolition of death penalty was a product of constitutional courts' decisions), economic austerity measures of the government (Hungary), important aspects of taxation laws and tax provisions of the annual budgets (Poland), requirements for naturalisation (Slovenia), privatisation of public land (Slovenia), and restrictions of certain rights of same-sex couples (Hungary), etc. This is an admittedly chaotic and random list, but I believe that it suffices to convince a reader that at least in some of the Central European countries, constitutional courts have on occasion displaced the preferences of parliamentary majorities on fundamental matters.

The importance of the laws overturned is only one part of a test for "activism" of the constitutional courts. Another, equally essential factor, is the nature of the reasoning which led to invalidation decisions. After all, if the courts *are* constitutionally mandated to check the statutes for unconstitutionality, they may have no choice but to overturn the laws which, on their face, clash with constitutional provisions. But then, the consistency or otherwise of two legal provisions (one of which is in the constitution) is always a matter of interpretation, and people may disagree in good faith about an interpretation of any two provisions: the one which is subject to a constitutional challenge, and the one which is the basis for a possible invalidation decision.

Rather than getting embroiled in a theoretical discussion about what renders a judicial reasoning "activist" (and whether such a characterisation makes sense at all), I will give some examples of characteristic patterns of reasoning of constitutional courts of the region discussed here, and appeal to certain intuitive, commonsensical and relatively uncontroversial views about how these patterns are symptomatic of judicial restraint or judicial activism of the courts in question. I will, further, discuss in some detail two important decisions on the death penalty and on abortion, from Hungary and Poland respectively, to give the reader an insight into the patterns of judicial reasoning of the constitutional courts in these countries.

In all fairness, one should note that the rhetoric of judicial *restraint* is well present in the case law of constitutional courts – and often the rhetoric is adhered to in the actual structure of argument. The courts, when engaging in judicial review, often emphasise the presumption of constitutionality of statutes. For example, Polish Constitutional Tribunal in a 1997 decision on collective agreements in the workplace stated:

The burden of argument is on those who challenge the constitutionality of a law and unless they produce a specific and convincing legal argument to prove their points, the Constitutional Tribunal will recognise the laws under challenge as constitutional.⁷⁶

In a similar fashion, the courts often acknowledge the wide scope of the legislator's legitimate discretion. The Hungarian Constitutional Court in its 1991 decision on abortion stated that "[w]here the law should draw the line between the unconstitutional extremes of total prohibition and unrestricted availability of abortions is for the legislature to decide".⁷⁷ The courts also like to declare that, within the domain of legislative discretion, it is a political rather than constitutional responsibility which controls the legislator.⁷⁸ They also characterise their own role as, at best, a "negative legislator", rather than positive one, repeating a well known Kelsenian formula for a constitutional court.⁷⁹ Most of all, they never tire of reminding their audience that the grounds of their decisions are not "political" but "strictly constitutional", implying that the judges' political or moral preferences do not enter into the process of review.⁸⁰

But there have been also some important decisions of the constitutional courts which are unmistakably "activist" – in the sense that the court *had* an option of upholding the statute, within a recognised conventions of judicial reasoning, and yet decided to overturn it. If a set of recognised conventions of judicial reasoning makes it possible for the Court to uphold the law, but also makes it possible to overturn it, a tendency to choose the latter path may be seen as an indicium of "activism". This happens when, for example, a Court grounds its decision in very abstract, general and vague constitutional notions, about the specific articulation of which reasonable people may disagree, even though it had an option of founding its decision on narrower and less ambiguous notions. "Human dignity" used as a sufficient basis for overturning specific statutes is a good example. The Hungarian Court appealed to this notion in different contexts. For example, in a 1990 decision the Court proscribed trade unions from representing employees without their consent, the Court relied on "human

⁷⁶ Decision K. 19/96 of 24 February 1997, in *Orzecznictwo Trybunału Konstytucyjnego, Rok 1997* [Case Law of the Constitutional Tribunal, 1997] (Warszawa: C.H. Beck, 1998): 65-77, at 72.

⁷⁷ Decision no. 64/1991 (XII 17) AB of 17 December 1991, *East European Case Reporter of Constitutional Law* 1 (1994) 27.

⁷⁸ E.g. Decision of Polish Constitutional Tribunal no. K 22/95 in *Orzecznictwo Trybunału Konstytucyjnego, Rok 1996* [Case Law of the Constitutional Tribunal, 1996], vol. 1 (Warszawa: C.H. Beck, 1996): 106-21 at 120.

⁷⁹ See Decision of Polish Constitutional Tribunal no. K 13/95 of 24 September 1996, in *Orzecznictwo Trybunału Konstytucyjnego, Rok 1996* [Case Law of the Constitutional Tribunal, 1996], vol. 2 (Warszawa: C.H. Beck, 1996): 79-105 at 104.

⁸⁰ E.g. Decision of Polish Constitutional Tribunal no. K 19/96 of 24 February 1997, *supra* note 76 at 72-73.

dignity” and established the following general principle: “When none of the ... named fundamental rights are applicable for a given state of affairs” then the “general personal right [to dignity] ... may be relied upon any time by the Constitutional Court”.⁸¹ This is all the more remarkable since, as one (friendly) commentator of the Court noted, rather than relying upon the right to dignity, the Court could have easily held that the constitutional clauses which specifically relate to the rights of unions “to safeguard and represent the interest of employees”, only authorise representation with consent.⁸²

Arguably, the most telling example of a use of vague and ambiguous notions in the service of overturning a clear legislative and constitutional intention is provided by the same Court’s decision invalidating the death penalty.⁸³ To reach this – laudable, from the point of view of this author – result, the Hungarian Court had to face the problem that the Constitution, on the basis of which it allegedly acted, contained a stipulation that “no one may be arbitrarily deprived of life and human dignity” (art. 54 (1)). While silent about the specific issue of death penalty, this provision clearly implied that a “non-arbitrary” deprivation of life was constitutionally permissible. A judge faced with this textual implication who is intent on striking down the death penalty as unconstitutional, can theoretically reach this result in one of two ways, neither of which is quite satisfactory. She may either (a) claim that death penalty is necessarily arbitrary and thus prohibited under art. 54 (1), or (b) find another constitutional provision which would constitute a basis for invalidating death penalty, and give precedence to that other provision over 54 (1). In the opinion for the majority, the latter path is taken. The Court relies on art. 8 (2) which proclaims that “rules on fundamental rights and obligations shall be determined by laws which, however, shall not impose any limitations on the essential contents of fundamental rights”, in connection with the right to life and dignity. The Court said that the death penalty necessarily reaches the “essential content” of the right to life, and so – to the extent that art. 54 (1) may be read as permitting a non-arbitrary deprivation of life – it is superseded by art. 8 (2). But of course whether a non-arbitrary enforcement of death penalty violates an “essential” aspect of human right and dignity is a moral proposition about which reasonable people may – and do – disagree. The Court opted therefore for a controversial moral judgement over a more precise and narrow constitutional permission.

Interestingly, in his concurring opinion, Chief Justice László Sólyom used *both* strategies and it is no wonder that applying both of them creates a clear impression of an overkill. As to strategy (a), he argues that capital

⁸¹ Quoted by Gábor Halmai, “Comment: The Constitutional Court of the Republic of Hungary”, *East European Case Reporter of Constitutional Law* 1 (1994) 116 at 116.

⁸² *Id.*

⁸³ Decision 23/1990 of 31 October 1990, reprinted in Sólyom & Brunner, *supra* note 2 at pp. 118-38.

punishment necessarily intrudes upon an “essential” area of life and dignity because they are “an absolute value” and form an “indivisible and unrestrainable right”. But if this were true then any law affecting adversely life and dignity, even if marginally, would have to be invalidated!. As to strategy (b), he argues that capital punishment is necessarily “arbitrary”, not in any empirical, sociological sense (for example, because it fails achieve its purported aims) but rather “conceptually”. Apparently, “capital punishment is arbitrary not because it limits the essential content of the right to life but because the right to life and dignity – due to their characteristics – is from the outset unlimitable”.⁸⁴ This is a strange statement, and can hardly be read in any other way than as an expression of strong moral disapproval for death penalty. Such moral disapproval is plausible and resonates with many people’s feelings – but as it happened, not with those of the majority of Hungarians, nor with the majority of the Hungarian MPs acting both in its law-making and constitution-making mode. Why should *their* moral judgments, as expressed in legal practices, be replaced by that of the Court, is *the* true issue which should have been addressed in this decision, but wasn’t.

As another example, consider a momentous 1997 decision of the Polish Constitutional Tribunal on abortion law.⁸⁵ The Tribunal struck down as unconstitutional some liberal aspects of the then Polish abortion law, basically finding any abortion other than justified on strictly defined medical grounds (because of threat to mother’s health, or the genetic defects of the foetus) or resulting from rape, as contrary to the Constitution. The decision was all the more remarkable since it ran contrary not only to the then majority opinion of the legislators (the Parliament was dominated by the centre-left coalition at the time) but also to the clear implications of the constitutional text. At the time the decision was handed down, a so-called Little Constitution (an interim constitutional document, virtually free of constitutional rights) was in force, and it contained no reference to the “right to life”, much less a right to life from the moment of conception. More importantly, a new, fully-fledged Constitution had been already adopted, including being passed in a national referendum, and was about to enter into force as from October 1997.⁸⁶ While formally speaking, the new Constitution was not binding on the judges of constitutional court, it provided a good insight into the views of the constitution-makers. The new Constitution *did* make a reference to a right to life yet importantly, demands to

⁸⁴ Id. at 133 (Sólyom, P., concurring).

⁸⁵ Decision no. K 26/96 of 28 May 1997, in *Orzecznictwo Trybunału Konstytucyjnego, Rok 1997 [Case Law of the Constitutional Tribunal, 1996]*, (Warszawa: C.H. Beck, 1998): 173-246. This decision was reprinted in *East European Case Reporter of Constitutional Law* 6 (1999): 38-129.

⁸⁶ The new Constitution was adopted by the National Assembly on 2 April 1997, subjected to the constitutional referendum on 25 May 1997, promulgated by the President on 16 July 1997, and entered into force on 17 October 1997.

include the proviso “from the moment of conception” had been considered and explicitly rejected by the drafters. At the very least, constitutional judges knew that the constitution maker had chosen not to prohibit abortion.

Faced with these textual constraints, the Tribunal nevertheless proceeded to argue that the availability of abortion on grounds other than those of (1) the danger to the life or health of a pregnant woman, (2) genetic defects of the foetus, or (3) pregnancy being a consequence of rape, are contrary to the Little Constitution. In the absence of any reference to right to life in that interim document, the Tribunal decided to base its conclusion, somewhat improbably, on the interpretation of the concept of the democratic “state based on law”, or *Rechtsstaat*, proclaimed in the first article of the Constitution. The centrepiece of the reasoning of the majority (and one should add that the decision was accompanied by three strongly worded dissenting opinions) was that the *Rechtsstaat* presupposes a community of people, and that the essential attribute of individuals is their life which has to be constitutionally protected “at each stage of its development”.⁸⁷ While the “value” of life is not subject to gradation as a function of different stages of its development, the intensity of the protection can be varied, depending on the conflict of this value with other constitutional values and interests, the Tribunal announced.

A connection between this principle and the line drawn between some kinds of abortion (such as abortion necessitated by the health of a pregnant woman, which are permissible) and other kinds (abortions because of “hard life conditions or difficult personal situation” of a pregnant woman) rests on a value judgment which cannot be inferred from the Constitution itself. The Court decided to ignore the ‘authentic interpretation’ of the meaning of the Constitution, provided by very recent process of drafting of a new Constitution, and established as law its own judgment on a very controversial matter. Many observers suggested that the decision was an a response to the pressures by the Catholic Church – which was, at the time, strongly agitating to de-liberalise abortion regime in Poland, and that the decision might have been related to the impending visit of the Pope John Paul II in Poland.

Another symptom of activism of some of the Central European constitutional courts is their predilection for a “balancing jurisprudence”, especially of the least deferential kind, namely, of assessing whether the legislative measures are necessary to attain approved legislative purpose. As is known, the use of balancing, “is transforming constitutional discourse into a general discussion of the reasonableness of governmental conduct”, and is therefore the kind of reasoning which situates the court in a characteristically legislative mode.⁸⁸ A 1997 decision of the Slovenian Constitutional Court provides a good example. It concerned the proposed referendum on

⁸⁷ Supra note 85 at 181.

⁸⁸ See T. Alexander Aleinikoff, “Constitutional Law in the Age of Balancing”, *Yale L. J.* 96 (1987) 943.

amendments to the law on re-privatisation of real property, mainly, agricultural lands and forests.⁸⁹ The referendum, proposed by three parties which obtained over 50 thousand voters supporting it, was meant to water down the reprivatisation law of 1991 by (among other things) introducing a ceiling on the size of the lands returned to the former owners, and also by banning the return of the land “of feudal origins”. The Court, exercising its power of review of referendum questions, largely disarmed the referendum proponents. It struck down the central question, aimed at introducing the limit of 100 hectares of land or forests by refuting – on allegedly empirical grounds – the rationale provided by the proponents of the referendum, namely, that the return of very large areas was not within the capacities of the state, and would hinder the return of smaller pieces of land. This is clearly a sort of judgment on the cost/benefit calculus which is characteristically a domain of the political branches, not the court. As to the prohibition of a return of the lands “of feudal origins”, the Court inserted its own proviso that this prohibition must not apply to the land owned by churches and other religious institutions. Contrary to the intentions of the authors of the referendum, the Constitutional Court argued that “it would not be constitutionally permissible to equate the nationalised property of the church and religious communities *in view of their role as institutions of general benefit* and their position in the Slovenian legal system, with the estates of feudal origin”.⁹⁰ In other words, a preferential exemption for the churches has been carved out by the Constitutional Court on the grounds of a positive assessment of the social role of the church. This assessment by the Court pre-empted a judgment by the general public whether the prohibition of return of feudal property should apply also to religious institutions. This judgment was made by the Court within the pattern of strict scrutiny (not a concept used explicitly by the Court), namely, on the basis that the

proposed measures must be unavoidable in a democratic society, dictated by urgent public need [and that] the . . . measures . . . must, in compliance with the principle of proportionality, be appropriate and unavoidable in order to reach the legislator’s objectives....⁹¹

If the standard of scrutiny of a statutory regulation is whether the measures adopted by legislators (or, as the last case illustrates, the measures contemplated by referendum questions) are “unavoidable” and “necessary” to attain the approved goals, the pattern of reasoning of the judges becomes virtually the same as that of legislators. It also expresses a high degree of

⁸⁹ Resolution U-I-121/97 of 23 May 1997, reprinted in *East European Case Reporter of Constitutional Law* 4 (1997):279-303.

⁹⁰ Id. at 288, italics added.

⁹¹ Id. at 286.

distrust to the legislature's judgment, and reduces the likelihood of affirming the regulation. It is almost always possible to establish an availability of a *different* measure from the one adopted by the legislature, and if such a demonstration is sufficient to defeat the legislation, no trace of deference to the legislative judgment can be found in the Court's approach.

V. Reasons for the adoption of the "continental European" model

To ask why the CEE countries have adopted, without exception, a "European" model of abstract judicial review, concentrated in a specialized constitutional-review body, may sound silly. After all, they *are* European countries, they *do* belong to a "continental" legal and constitutional tradition, and those same factors which determined the victory of the Kelsenian⁹² judicial review (as opposed to the US model) on the continent, arguably must have informed the emergence of this very type of courts in the Central and Eastern part of the continent, when the circumstances for democratic development finally became ripe.

At the end of the day, this may be the correct answer, and yet I do not think that the consideration of this question is superfluous. Asking the simplest and the most naïve questions can sometimes be illuminating. I believe that this is the case here. For one thing, not all Western European countries have adopted any system of *judicial* constitutional review at all, and of those Western European countries that have adopted a Kelsenian model, at least one (Greece) came close to a dispersed, US-style model.⁹³ As Allan-Randolph Brewer-Carías argued at length in his book, there is no necessary connection between the way constitutional review is designed (that is, whether it is centralized or diffuse) and the family of legal systems to which a given nation belongs (that is, whether it is a civil or common law system).⁹⁴ Second, even in some of the most

⁹² "Kelsenian" is herein used as a short-hand to describe the Continental model of abstract and centralized review. I am however conscious that the model which emerged in Europe after the Second World War, in particular in Germany, but also in Italy, Spain, France etc, is not a purely "Kelsenian" model because it envisaged, among other things, a rights-based scrutiny of constitutionality of laws, and contains important elements of "positive" legislation. In both these respects, Hans Kelsen expressed the opposite views when he advocated the establishment of the constitutional court in Austria. See Stone Sweet, *supra* note 21 at pp. 34-38; Sergio Bartole, "Concluding Remarks" in Giuseppe di Vergotini, ed., *Giustizia costituzionale e sviluppo democratico nei paesi dell'Europa Centro-Orientale* (G. Giappichelli Editore: Torino, 2000) at p. 357.

⁹³ Under the 1975 Constitution of Greece (art. 95), all courts have the power not to apply legal provisions which they consider to be contrary to the Constitution. A diffuse system exists also to a certain degree in Switzerland (although only Cantons' laws, not the federal ones, can be judicially reviewed) and in Portugal.

⁹⁴ Allan Randolph Brewer-Carías, *Judicial Review in Comparative Law* (Cambridge, Cambridge University Press, 1989), pp. 128-131.

emblematic systems of abstract and centralized review such as Spain, there have been proposals to establish a decentralized, American-style model, in which all courts would be authorized to review statutes under the constitutional rights claims.⁹⁵ Third, we should be wary of explanatory determinism: after all, the emergence of the Kelsenian model in CEE may be *under-determined* by the factors usually referred to in this context. If this is the case (as I indeed believe with regard to a number of explanations discussed below), then the emergence of such a model may be seen to be a historical contingency, and a belief in a plausibility of an alternative scenario (in which the American-style model would have been chosen) may not be as absurd as it seems at first blush. And further, if that is the case, the usual *explanations* for the emergence of the current system may be better characterized as *justifications* for the maintenance of that particular system. They can therefore be seen more as legitimating the status quo than analyzing it dispassionately.

After all, the post-1989 constitutional and political scene in CEE was, partly at least, a laboratory in experimentation in which many of the decision-makers could have thought that they were making a fresh start. Of course no start is ever fresh. But the post-1989 was a mixture of the embeddedness in the old traditions and experimentation with the new. There were many options on the menu, and the American-style solution on many constitutional arrangements was not out of the question. In addition, there was no shortage of American experts around, including constitutional experts, to provide advice and advocate the right solution. And it just happened that the solutions proffered by American constitutional experts were, most often, those corresponding to the liberal (in the American sense of the word) reading of the US constitutionalism – which included activist, US-style judicial review. Some of those American liberals explicitly urged the new activist constitutional courts (in particular, the Hungarian Court) to abandon abstract review altogether and, hence, to follow the US path.⁹⁶

If we reconsider the question of why the CEE countries adopted the centralized and abstract model of review, *and* if as a result of this reconsideration we conclude that the usual explanations fail to fully account for the choice of the model (hence, they “under-determine” the model), then we can gain two things. First, we can help re-open the debate about the merits of the US style review and its future prospects in the region. (This, of course, is relevant only if we find that the US model has some advantages over the centralized and abstract model; something that I cannot even begin to argue here).⁹⁷ Second, we can debunk the usual explanations by showing that, to some degree (that is, to

⁹⁵ See Stone Sweet, *supra* note 2 at pp. 120-21.

⁹⁶ See Bruce Ackerman, *The Future of Liberal Revolution* (Yale University Press, New Haven 1992), pp. 108-9.

⁹⁷ For my argument to this effect, see Sadurski, *supra* note 17.

the degree that there *is* under-determination) , they are *ex-post facto* rationalizations, and hence must be seen as legitimating ideologies.

Let us dispense first with what are arguably the two weakest explanations of the phenomenon of constitutional courts in CEE. The first one appeals to the willingness of the countries of the region to match the expected criteria which would facilitate their admission to the European Union, and those criteria are said to include a "European" rather than the US style of judicial review. It has been also said that the EU, generally, expected the candidate countries to set up the system of constitutional courts which would have very strong position vis-à-vis legislatures: "[w]hile parliaments and presidents will predictably resist judicial interventions, they are painfully aware that highly visible confrontations with their domestic constitutional courts will gravely threaten prospects for early entry into the European Union, which is already looking for excuses to defer the heavy economic costs that admission of the East entails".⁹⁸

This is a sheer speculation, and improbable at that. I know of no evidence to suggest that the accession to the EU figured on constitution-makers' minds when deciding about the system of constitutional review in CEE, and I do not know why it should. After all, the preparations to the accession to the EU, even in the cases of the countries long considered the most obvious candidates, began well after the establishment of constitutional courts. And, on the other hand, I know of no evidence that the EU made it a part of its set of criteria for candidate states that they establish a system of constitutional review with a strong position of the courts vis-à-vis the legislature. In the first important decision of the EU which can be seen as setting the conditions for membership by post-Communist European states, the European Council in Copenhagen in December 1993 established that the candidate countries in order to be successful must display, among other things, "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities" but no specific institutional forms of attaining these conditions have been established. Apart from everything else, it would be hypocritical for the EU to expect, much less demand, that constitutional courts be established: there are members of the EU whose democratic credentials are unimpeachable and who have no French- or German-style constitutional review.⁹⁹

The second explanation which seems to me quite weak is that there is an correlation between the fact that a country has just emerged from a period of authoritarian rule and the fact that it has established a "Kelsenian" rather than the US-style model of constitutional review. One can see a certain logic in the question by Louis Favoreu: "How could an American system function in the

⁹⁸ Bruce Ackerman, "The Rise of World Constitutionalism", *Virginia Law Review* 83 (1997): 771-797, pp. 776.

⁹⁹ The United Kingdom and the Netherlands have no judicial constitutional review at all, while Denmark, Ireland, Greece and Sweden have adopted systems bearing resemblance to the US-style model of decentralized judicial review.

Federal Republic of Germany, Italy, Spain, or Portugal, with judges from the preceding period of dictatorship named to the courts? Adopting judicial review in these countries would require "purification" on a massive scale of a corps of magistrates, while one could immediately find a dozen or so constitutional judges with no prior culpability during those periods, capable of carrying out their duties without mental reservations".¹⁰⁰ The argument about a generalized distrust to the judiciary as the state emerges from a period of authoritarian rule, is then extrapolated upon the CEE post-Communist countries.¹⁰¹ And yet, the reality of post-Communist regimes defies a simple dichotomy noted by Favoreu. Neither were the judges of Constitutional Courts in the region quite "purified" of their old habits and ideologies, nor were the ordinary judges as hopelessly immersed mentally in the "preceding period of dictatorship" as to offer no likelihood that they will dispense justice in accordance with the new axiology of the law.

One must not protest too much. Ruti Teitel certainly has a point when she observes that "as new forums specially created in the transformation, [new constitutional courts'] very establishment defines a break from past political arrangements".¹⁰² Indeed, a "concrete" system of review would most probably have to rely on the old judiciary and so the symbolic effect of novelty would be lost. But the explanatory power of this observation is limited. Even leaving aside the counter-examples of Poland and ex-Yugoslavia (where the establishment of constitutional courts was not coinciding with the transformation), there have been some "old" institutions (such as Presidency in Poland or Czech Republic) which quickly acquired a much more powerful symbolism as vehicles of transformative politics than the "new" constitutional courts. No doubt, Vaclav Havel or Lech Walesa were much more powerful symbols of the new, even though they occupied "old" offices, than the largely nameless and faceless judges of constitutional courts in Warsaw and in Prague.

Perhaps the most significant explanatory power lies with the attachment of lawyers and constitution-makers in the region to the traditional "European" (as opposed to the US) tradition of separation of powers in which the role of ordinary judges is strictly confined to the application as opposed to the making of law. The adoption of the Kelsenian system seemed to disturb this tripartite structure of government to a lesser extent than allowing all the regular courts to check the laws for their unconstitutionality in the course of ordinary adjudication. The point made about the Western European systems, that the Kelsenian model "could be easily attached to the parliamentary based

¹⁰⁰ Louis Favoreu, "American and European Models of Constitutional Justice", in David S. Clark, ed., *Comparative and Private International Law: Essays in Honor of John Henry Merryman on His Seventieth Birthday* (Duncker u. Humblot, Berlin 1990), p. 110.

¹⁰¹ See, e.g., John Ferejohn & Pasquale Pasquino, "Deliberative Institutions" (unpublished manuscript 2000, on file with the author).

¹⁰² Teitel, *supra* note 51 at p. 2032.

architecture of the state”¹⁰³ applies to the CEE countries as well. This has been certainly a frequent argument within the doctrine of these countries: that to authorize regular judges to declare the laws unconstitutional would place them above the legislature and would be inconsistent with the tripartite division of powers.¹⁰⁴

These are plausible explanations, as far as the compatibility of any form of judicial review of constitutionality with “old constitutionalism”¹⁰⁵ is concerned. But much the same reasons which are being produced against the US-style judicial review, in terms of traditional tripartite separation of powers, can be used to attack abstract and centralized judicial review, as long as it is *judicial* rather than kept within the legislative branch. All the more so, it applies to the concrete judicial review exercised by constitutional courts, alongside with their power of abstract review. If a single ordinary court can initiate a review of a statutory provision by (what is seen to be) a court, albeit a special type of court, what is left of the traditional European separation of powers, with the dogma of the sovereignty of parliaments and a linked dogma of courts being confined to applying, as opposed to making, the law?

Perhaps a more relevant point is the *formal* absence of a doctrine of “*stare decisis*” in the continental legal tradition. In the “decentralized” model of judicial review, such as in the US, a strong precedent doctrine provides for a degree of consistency within the overall judicial system. When all the courts have to follow the *rationes decidendi* of the Supreme Court, and of the relevant higher appellate courts in their respective jurisdiction, the dangers of arbitrariness, uncertainty and lack of uniformity are minimized. But when there is no *stare decisis* (so the argument goes), a concrete-decentralized model threatens the unity of a legal system, and one can envisage an unwieldy situation in which some courts could find a particular law unconstitutional while others might uphold it.

But the distinction is one of a degree rather than of kind, and it cannot make all that much difference. The decentralized system yields a degree of uncertainty and inconsistency, regardless of the *stare decisis* doctrine. In the United States, unless and until the Supreme Court has pronounced on a given issue (which, under a certiorari system and due to a control of the Court of its own agenda need not be the case on every contentious constitutional issue

¹⁰³ Stone Sweet, *supra* note 21 at p. 37; see also Stephen M. Griffin, *American Constitutionalism* (Princeton University Press, Princeton 1996), p. 121.

¹⁰⁴ See e.g. Andrzej Wasilewski, “Przedstawianie pytań prawnych Trybunałowi Konstytucyjnemu przez sądy (art. 193 Konstytucji RP)”, *Państwo i Prawo* vol. 54, no 8/1999, pp. 25-39, at p. 29; Anna M. Ludwikowska, *Sądownictwo konstytucyjne w Europie Środkowo-Wschodniej w okresie przekształceń demokratycznych* (TNOiK, Toruń 1997), p. 21.

¹⁰⁵ On “new constitutionalism” in Europe, contrasted to pre-World War II European constitutionalism, see Stone Sweet, *supra* note 21 at p. 31 and 37-8.

tackled by lower appellate courts), there may exist a situation in which the Courts of Appeals for different circuits will come up with different solutions to one and the same constitutional controversy.¹⁰⁶ On the other hand, it is simply not the case that in the continental European law a system of judicial precedent does not operate in fact. In that system, consistent decisions of the courts – especially, of highest courts – are in practice treated as unquestionable sources of law. This is so even if the doctrine explicitly rejects the idea of a precedent as a binding source of law. Consider this exposition of the French approach by two leading French constitutional theorists: “The courts very rarely cite precedents and must not base their decisions on them, because the only legitimate source of law consists of statutes. On the contrary, if one looks at the material that is in fact used, one realizes that precedents are the most important. . . . Precedents, without being formally binding, may have force if created by a court superior to that where the case is pending. This simply reflects the hierarchical structure of the courts”.¹⁰⁷ Similarly, in the CEE countries it has been long accepted that, for instance, judgments of the Supreme Courts have a role of binding precedents for all other courts, at least to the degree to which the written laws do not provide determinate solution to a particular controversy.¹⁰⁸

The upshot is that neither the general “architecture” of the system of separation of powers, nor the significance (or otherwise) of the precedent, provide sufficiently strong relevant reasons for opting for a Kelsenian as opposed to the US-style model of constitutional review. It may be seen more as an excuse than a convincing justification. In this, the establishment of abstract/centralized review after the fall of Communism resembles the establishment of abstract/centralized review in Western Europe where, as Alec Stone notes “a majority of political élites remained hostile to sharing policy-making authorities with judiciaries” and where the opponents of decentralized concrete review saw in such a scenario “the spectre of the dreaded ‘government

¹⁰⁶ This is not merely a theoretical possibility. Consider the current status of affirmative action, one of the most contentious issues in American constitutionalism. In 1996 the Court of Appeals for 5th Circuit invalidated an affirmative action plan implemented by the University of Texas Law School and held that the use of race as a factor in university admissions was constitutionally proscribed, *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.1996). The other circuits follow the 1978 Supreme Court’s decision *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) which explicitly permitted certain forms of race-based preferences in admissions. The *Hopwood* court argued that it was not bound by *Bakke* precedent because Justice Powell’s opinion (for the Court) did not garner a majority (in fact, the central part of Powell’s opinion, though not an opinion in its entirety, was joined by the majority of judges). The Supreme Court denied *certiorari* in *Hopwood*, 518 U.S. 1033 (1996). I am grateful to Robert Post for this suggestion.

¹⁰⁷ Michel Troper & Christophe Grzegorzczuk, “Precedent in France”, in D. Neil MacCormick & Robert S. Summers, *Interpreting Precedents: A Comparative Study* (Dartmouth: Aldershot, 1997), pp. 103-140 at pp. 112-13 and p. 117.

¹⁰⁸ See, e.g., Lech Morawski & Marek Zirk-Sadowski, “Precedent in Poland”, in MacCormick & Summers, *supra* note 107 at pp. 219-58.

of judges’”.¹⁰⁹ It may well be that such fear also weighed on constitutional decision-makers’ minds in the CEE when they refused to consider the decentralized, US-style of constitutional review. But let us note a strange inconsistency between such an explanation and, on the other hand, another conventional reason given against the US-style judicial review in Europe, namely, about the low status, prestige and skills of continental judges as compared to the US. If indeed (as is largely the case) “the judiciaries of these new nations [*sic*] have very little institutional capital”¹¹⁰ then the fear that these judiciaries will reach for the power amounting to a “government by judges” seems ill-founded. And perhaps Japan, which has a concrete/decentralized model within the context of a relatively low-status judiciary¹¹¹ shows that the fear of “government by judges” once the decentralized model of constitutional review is instituted is unfounded. And it is clear, upon reflection, why. Because the decentralized review carries with itself a whole set of doctrines of judicial restraint which are simply inapplicable to abstract constitutional review.¹¹²

But (it may be claimed) the reason for the priority of abstract and centralized review and hostility towards the decentralized is deeper than that. The United States – an emblematic case of decentralized/concrete review, has a tradition of free-market, anti-statist approach to law, officials and the state. In contrast, the CEE countries share with their Western continental counterparts a tradition of statist and centralized approach to the state in general, not just to the judiciary. The higher the role of the state in society and economy, the more tendency there is towards state-controlled review of constitutionality. Such an argument has been recently made by John C. Reitz who describes a close correlation between forms of review and the general approach to the role of the state.¹¹³ In the US, where a market-centred approach prevails, only concrete review is available, with some residual aspects of abstract review (but not capable of being initiated by political actors). At the other extreme of the spectrum, in the most statist-centrist tradition, France, only abstract review initiated by political actors is allowed. In the mixed systems (e.g. Germany), we have a combination of abstract review, concrete review and constitutional complaint.

There seems to be an undeniable logic in the asserted fit between abstract review and statism because various forms of concrete review (which normally

¹⁰⁹ Stone Sweet, *supra* note 21 at p. 40.

¹¹⁰ Owen Fiss, “Introductory Remarks, Symposium”, 19 *Yale J. Int. L.* 219 (1994).

¹¹¹ For a characterization of the Japanese system of constitutional review as “modeled very much after the American system of judicial review”, see Itsuo Sonobe, “Human Rights and Constitutional Review in Japan”, in David M. Beatty, ed., *Human Rights and Judicial Review* (Kluwer: Dordrecht, 1994), pp. 135-174, at p. 138.

¹¹² I develop this argument in Sadurski, *supra* note 17.

¹¹³ John C. Reitz, “Political Economy and Abstract Review in Germany, France and the United States”, in Sally J. Kenney, William M. Reisinger & John C. Reitz, *Constitutional Dialogues in Comparative Perspective* (Macmillan, Houndmills 1999), pp. 74-84.

have to be initiated by the subjects not directly controlled by politicians, such as ombudsmen, the judiciary, or, in the case of constitutional complaint, by the individuals) implicate a partial loss of control by the state of the initiation of constitutional review. The correlation seems to be supported by the other European cases *not* considered by Reitz, namely by Italy and Spain, which, on the spectrum ranging from statism to market-centredness can be located half way between the US and France, and where the judiciary (in the case of Italy) and the judiciary or the Ombudsman or the individuals concerned (in the case of Spain) can initiate the process of concrete review. But is there really such a correlation? Was Italy of 1948 so much less statist-oriented than France of 1958 as to account for the difference between the presence and the absence of concrete review? And similarly, was post-Franco Spain of 1978 as infused with non-statist, corporatist elements as Germany of early 1950's that the presence of concrete review which can be initiated even by individuals can be explained by the role of the state?

Perhaps. I am unable to pursue such an analysis in the framework of this working paper. Only two observations are in order at this point. First, one should be careful not to take the very availability of concrete review as one possible *symptom* of the less statist approach to the role of the state (as public lawyers would probably tend to do) since the explanatory role of the state factor would be then nil. One and the same factor cannot at the same time be a result of and evidence for a proposed causal factor. Second, if the general approach to the role of the state is to explain the nature of judicial review in the CEE (something that Reitz is *not* doing) then we have a clear case of under-determination there. After the transition, the question of the tasks of the state in the society (and towards economy in particular) has been and still is one of the most contentious, unresolved issues in CEE.

But a more interesting question is, whether such a "fit" is present also at a deeper level, as Reitz suggests that there is a connection between the fundamental *values* underlying the model of review and those behind the model of the state? According to Reitz, the principal value which supports abstract review is "legal certainty". This is because an authoritative decision about the validity (constitutionality) of a new statute is taken even before (or soon after) the statute enters into force, and there is no period of uncertainty between the enactment and the review. In turn, such a period of uncertainty is necessarily produced by a form of review which is conditioned by a specific legal "case or controversy". So much is probably uncontroversial: legal certainty may be indeed higher in the system of abstract as opposed to concrete review. I say "probably" because, once the system allows concrete review alongside abstract review, as all the continental systems of judicial review do, with the exception of France, and as all the CEE systems of judicial review do, with the exception of Ukraine, the effect of legal certainty related to the abstract review is lost. Indeed, the effect of legal certainty is assured only when a review is solely *ex ante*, so that

once the law is ratified, there is no possibility of ever declaring it unconstitutional (as is the case in France). But *ex post* abstract review introduces an element of uncertainty. This element is related not so much to the abstractness but rather to the fact that review may be initiated (never mind by whom) already after the law entered into operation. And this kind of uncertainty can well be minimized by a simple technique of establishing a legal deadline by which a new law can be challenged.¹¹⁴ If no such techniques are actually being used¹¹⁵ it may be for the reason that the uncertainty resulting from abstract, *ex post* review has never been perceived as a major problem.

But even conceding, for the sake of argument, that abstract and centralized review provides for a higher level of legal certainty than the concrete and diffuse one, does it follow, as Reitz claims,¹¹⁶ that abstract review is based on a degree of paternalism, while the US model of concrete review reflects strong anti-paternalistic stance of the American constitutional system? In Reitz's words: "The kind of citizen required by a system limited to concrete review is a 'tough' citizen, one who is willing to run significant risks deliberately in order to vindicate his rights, not one who waits for the paternalistic arms of the state to take care of him".¹¹⁷ We may accept *arguendo* that the general hostility to paternalism is higher in the American political culture than in Europe. It remains to be seen whether this higher American anti-paternalism can indeed explain reliance on concrete review only and, *a contrario*, whether a relatively higher degree of acceptance of paternalism in Europe explains the European preference towards abstract review. Taking the argument one step at a time, it may be true that paternalism (government knowing what is good for its citizens better than citizens do themselves) is inconsistent with a high degree of legal uncertainty: a paternalist government would like to signal clearly to the citizens its expectations about their behavior. But the link between paternalism and high legal certainty (which yields, as we have seen, abstract but also in particular an *ex ante* or limited-in-time review) is

¹¹⁴ In contrast, such a deadline regarding a challenge initiated in the course of concrete review (but not constitutional complaint) that is, occasioned by a concrete litigation, would be clearly pernicious. A person has no control when she can be brought to court under a particular law which she can then claim unconstitutionally violates her rights!

¹¹⁵ As one example of such a time limit one might mention the rule in Poland until 1997 that abstract review of statutes applied only to statutes enacted no earlier than 5 years before the date of the Constitutional Tribunal's decision (Article 24 of the Law of 29 April 1985 on Constitutional Tribunal). This limit has been abandoned by the new statute on Constitutional Tribunal, adopted 1 August 1997. One may hypothesize that one reason why this provision was dropped had to do with its very low practical relevance: in a system of predominantly abstract review, where the challenges to laws are most likely to be launched by the defeated parliamentary minority, it is highly unlikely that challenges will be made to laws which have been on the books for a very long time.

¹¹⁶ Reitz, *supra* note 113 at pp. 80-81.

¹¹⁷ *Id.*, p. 81.

contingent and indirect at best. After all, any government interested in guiding the behavior of its citizens by clear rules, paternalist or not, has an interest in providing a high degree of legal certainty to citizens. This legal certainty (and thus, the efficiency of authoritative rules) clashes at times with other values, such as flexibility or individual self-determination, but it is not clear why the “paternalistic” attribute of rules would add an extra weight to the legal certainty side of the calculus. While the anti-paternalist might applaud opening the path for individuals through concrete review, it is question-begging that she should fear maintaining the path for abstract review at the same time, and so it is doubtful whether “[r]ejection of paternalism surely lies at the heart of . . . the US rules on justiciability”.¹¹⁸ The only reason why an anti-paternalist might disfavor abstract review would be that she would fear that the government (or any other official body endowed with the authority to initiate the review) could be tempted to exercise it in a paternalistic fashion, that is, on the basis of the alleged good of the citizens who might benefit from the success of the review, *even despite the citizens’ views to the contrary*. For paternalism, strictly speaking, occurs only when the authority displaces the actual citizens’ preferences while claiming that it is doing so for their own good. But such a depiction of the official motives behind the review strikes me as convoluted if not fanciful in most cases: in the emblematic examples of the exercises of review in the abstract-review-only situations, that is, in the famous decisions of the French *Conseil constitutionnel*, one would search in vain the cases which would fit such an account. And no wonder. When a French legislative minority successfully challenged the bills on media pluralism¹¹⁹ or on nationalization of enterprises¹²⁰ they did not appeal to any paternalistic arguments but to their own political or ideological visions, different from those of the majority. This was a routine game of democratic politics, resolved by the *Conseil* in these cases in favor of the minority, but appeals to paternalism did not (nor did they need to) figure anywhere in the discourse. As a general speculation, it is hard to see why, *as a rule*, the initiators of abstract review would “become detached from the concerns of the individuals whose rights are immediately at stake” so as to risk a situation in which the citizens would be actually opposed to the goals underlying such an intervention.¹²¹

But perhaps there is another type of link between paternalism and abstract review: a fear that the exercise of constitutional review by individuals

¹¹⁸ Id., p. 81. See also Lea Brilmayer, “The Jurisprudence of Article III: Perspectives on the ‘Case or Controversy’ Requirement”, *Harvard Law Review* 93 (1979), pp. 297-321 at p. 313.

¹¹⁹ See Stone Sweet, supra note 21 at pp. 80-83

¹²⁰ See id., pp. 66-8.

¹²¹ The words in quotation marks are from Lea Brilmayer, “A Reply”, *Harvard Law Review* 93 (1980), pp. 1727-33, at p. 1732, and they apply not so much to an abstract review initiated by political bodies but to the idea of public interest litigation launched by “altruistic plaintiffs”.

concerned would be unwise, immature, detrimental to themselves. Such fear would certainly have strong paternalist undertones, and one can understand why, when defending the projects of fundamental reform of constitutional review in France in the early 1990s, the then President of the *Conseil constitutionnel* Robert Badinter warned: “on ne peut traiter indéfiniment les citoyens en *éternels mineurs*”.¹²² The main point of the proposed reform (which failed to gain the support of the Senate) would be to endow each party to a legal process with a right to challenge the constitutionality of a statute (on the basis of an alleged violation of the party’s fundamental rights), provided the *Conseil constitutionnel* had not pronounced on the constitutionality of this law before. The attitude attributed (no doubt, with good reasons) to the opponents of the reform by President Badinter indeed smacks of paternalism.

However, once there exists in a given judicial system a path of concrete review (and, even more importantly, of constitutional complaint) available to individuals alongside the abstract review initiated by the political actors, the link between abstract review and paternalism disappears altogether. The French system *can* be therefore, perhaps, accused of (or only explained by reference to) the tradition of paternalism, but the German, Spanish, Italian etc. cannot. It is not that there is *less* paternalism in a mixed system which combines abstract and concrete review, rather that there is no link between paternalism and the constitutional model of review at all. So the possible link between the CEE model of review and a (putative) paternalistic tradition cannot be seriously upheld.

Perhaps a better explanation could be that concrete review is well suited to a narrow understanding of the role of the constitution (and, consequently, of the constitutional review), namely, when the constitution’s main purpose is seen as a safeguard of individual and minority rights against majoritarian oppression. This is very much a characteristically US model of constitutionalism. The tradition of seeing the protection of individuals against majoritarian oppression as one of the main purposes of the constitution has resulted in the well-established perspective on constitutional review seen as the last bastion of individual (and minority) rights against legislative intrusion. It is plausible that one who endorses this view of the constitution’s purpose and this perspective on constitutional review may have a clear preference for a concrete, as opposed to abstract, constitutional review. This is because if the whole point of the review is based in distrust towards political institutions, then it would be odd to endow those very institutions with the task of initiating such a review. When individuals feel that their rights are violated by the legislative majority, they can look after themselves and press their claims in the court leading, hopefully, to constitutional review – so the argument goes. However, if we broaden our view

¹²² Robert Badinter, quoted in Jean Gicquel, *Droit constitutionnel et institutions politiques*, 14th edn (Paris: Monthchrestien, 1995), p. 767 (emphasis in original).

about the proper realm of constitutionalism, and in particular if we incorporate socio-economic functions into the scope of the constitution (and, again, of constitutional review as a consequence), individual litigation is no longer an adequate mechanism to initiate constitutional review.¹²³

This proposition could be plausibly defended on a number of grounds but the most obvious would be that the individual citizens do not ordinarily have (each taken individually) sufficient interests which would compel them to launch a constitutional litigation, or (what comes basically to the same thing), that their interest in winning such litigation is, at best, only indirect and remote. What is important is that constitutional court is now seen not only as a protector of individual and minority rights against legislative majority but, more fundamentally, as a guardian of the Constitution as a whole, including its separation-of-powers rules and socio-economic policy constitutional guidelines, when applicable. And in such a perspective it is only logical that the judicial review of legislative acts should be triggered by political actors in those cases when one would not normally rely on individual court suits.

This argument seems plausible, though one must not exaggerate the link between abstractness of review and the policy-oriented nature of the review. After all, in the constitutional systems which rely on concrete review only, such as the United States, Canada or Australia, much review has a policy-oriented aspect, not reducible directly to the protection of individual rights against majority. It is significant that in a famous article about the Supreme Court's role, Robert Dahl had characterized the Court as a "national policy-maker" and showed that the dominant views on the Supreme Court have never been for long out of line with the policy views dominant among the lawmaking majorities of the time.¹²⁴ Under the relaxed rules of standing, not only individuals but also groups and associations can pick up various policy-based grievances and turn them into constitutional suits - in the US, they have standing to assert those interests of their members which are germane to the association's purpose.¹²⁵ Even broader test of standing was adopted in Canada where all that "a plaintiff in a suit seeking a declaration that legislation is invalid" needs to show is that "he has a genuine interest as a citizen in the validity of the legislation...."¹²⁶ In India, another concrete-review country, the courts have been long used for

¹²³ See Reitz, supra note 113 at pp. 81-84.

¹²⁴ Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker", *Journal of Public Law* 6 (1957): 279-295.

¹²⁵ See *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977), discussed by Brilmayer, supra note 118 at pp. 318-19. In this decision, the Supreme Court unanimously accepted the standing of a state governmental commission composed of representatives of the apple industry (and thus treated it as analogous to a voluntary association) to challenge the constitutionality of a statute regulating the packaging of apples. This is as clear a case as they have come to in using concrete review in order to change economic policy.

¹²⁶ *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575, 598, emphasis added.

public-interest legislation, and the standing to sue have been granted to any "member of the public having sufficient interest", where "sufficient interest" encompasses a genuine concern for the rights of others.¹²⁷ The concreteness of review does not seem to be such an impediment to policy-related complaints, after all.

But even if abstract review seems *better* suited to those exercises of review which are not directly related to a claim of a violation of individual right, this would only provide a partial explanation for the dominance of abstract review in CEE constitutional systems, for two reasons. First, even if one adopts a broader notion of constitutionalism, which encompasses a control by the constitution of large areas of policy-making, it still does not explain why one would want to involve a constitutional court into this control. Unless one equates the scope of constitution with the scope of justiciability, and believes that any constitutional violation should be reviewed by a constitutional court, the argument for abstract judicial review is question-begging. In other words, it is of course undeniable that abstract review does involve the court in the national policy-making to a much higher degree than concrete review. But it still does not follow that one *should* want to involve a court in the policy-making. Second, the prevailing arguments in favour of establishing constitutional courts in that region were made precisely in terms of a protection of constitutional rights against legislative violations of those rights, that is, in terms which place themselves safely in the traditional, anti-majoritarian logic of a concrete review. This, to be sure, was not the only type of the argument in the constitutional discourse of these countries but it was a dominant one. The leading courts in the region liked to emphasize that they saw their main role as the protector of individual rights. As the then Chief Justice Solyom of the Hungarian Constitutional Court declared, "We always stress that we are activists in certain areas, namely, concerning fundamental rights, where the Court does not hesitate to decide 'hard cases'. But we are self-restrictive concerning the problems related to the political structure".¹²⁸ A commentator on the Hungarian Court could therefore accurately observe: "The Hungarian Constitutional Court has defined its own activity as that of the guardian of human rights in the midst of a quasi-revolutionary transformation. . . .".¹²⁹ And this was by no means limited to the Hungarian court only.¹³⁰

¹²⁷ See Charles R. Epp, *The Rights Revolution* (University of Chicago Press, Chicago 1998), p. 86.

¹²⁸ Interview with László Sólyom, *East European Constitutional Review* 6 (1) (1997): 71-77, p. 72.

¹²⁹ Andrew Arato, "Constitution and Continuity in the Eastern European Transitions: The Hungarian Case (part two)", in Irena Grudzinska Gross, ed., *Constitutionalism & Politics* (Slovak Committee of the European Cultural Foundation, Bratislava 1993), p. 271.

¹³⁰ A judge of the Russian Constitutional Court states that the goal of protecting and guaranteeing human rights is one of the three, equally important, tasks of the Russian Court, alongside with overseeing the federal-regional relationships and the relationships between the

That is why a general thesis by Martin Shapiro that the power of constitutional courts today derives from the fact that they are useful as arbitrators in division-of-powers disputes, so that they “keep the basic institutional processes running”,¹³¹ and consequently that the acceptance by these political actors of the rights adjudication as a necessary cost of having this instrument in place, does not apply easily to the phenomenon of the CEE constitutional courts. As the above quoted declaration of Justice Solyom, among others, suggests, it is not the case that the main declared aim of setting up the constitutional court was to supply an umpire in division-of-powers disputes rather than to articulate rights. Neither is it the case that, in CEE, rights adjudication came later in time than the division-of-power adjudication, the trend that Martin Shapiro discerns with regard to other constitutional courts in the world. On the other hand, the fact that these courts tend to be more deferential to legislatures on separation-of-powers issues than on rights issues¹³² seems to confirm a hypothesis that, in order to gain a necessary capital allowing the Court to be activist on rights, it must “shore up its party political and popular support”¹³³ by deferring to politicians on other issues which may affect the politicians’ vested interests much more directly, namely on their powers and procedures available to them.¹³⁴

VI. The question of finality of decisions

In the post-communist world, only the Romanian tribunal has a less-than-final power of review, in the sense that its decisions about unconstitutionality can be overridden by a parliamentary supermajority (also in Poland it was the case under the regime of so-called Little Constitution, now superseded by a new fully-fledged Constitution of April 1997). This is considered a sign of its institutional disadvantage,¹³⁵ and as inconsistent with the very principle of the rule of law.¹³⁶ But for those who deplore the anti-democratic consequences of judicial power, the non-finality offers a way of reconciling democratic decision-making with constitutional review. The power of constitutional tribunals to

highest bodies of the Russian state, Interview with Boris Ebzeev, *East European Constitutional Review* 6 (1) (1997):83- 88, p. 86.

¹³¹ Martin Shapiro, *supra* note 25 at p. 205

¹³² See Arato, *supra* note 129 at pp. 272-3.

¹³³ Zifcak, *supra* note 12 at p. 27.

¹³⁴ See, similarly, Osiatynski, *supra* note 11 at p. 151, n. 185.

¹³⁵ See, e.g. interview with Andrzej Zoll, the then Chief Justice of the Polish Constitutional Court, in *EECR* 6 (1) (1997) 77-78 at 78: “The main problem is the ability of the Sejm to overrule Tribunal decisions....”. Elsewhere, Professor Zoll argued that the retention of the parliament’s power to override the Tribunal’s decisions after the changes of 1989 was a remnant of a totalitarian system.

¹³⁶ Conversation with Prof. Lucian Mihai, President of the Constitutional Court, Bucharest 9 March 2001..

review acts, but only tentatively, means that legislators -- and the general public -- are asked to have a second look at proposed legislation, and consider the constitutional aspects which perhaps had not been considered sufficiently in the first approach. It is the power that slows, but does not derail, the operation of majority rule.

But even if we put to one side the possibility of parliamentary override, the power of constitutional review should not be seen as a matter of a dichotomy -- either the constitutional tribunal's decisions are final, or they are only tentative -- but rather as part of a continuum. At one end of the spectrum, the tribunal's decision adds only an insignificant cost to the legislative process and the will of the legislators is subverted only to a minimal degree; at the other end of the spectrum, the cost of overriding the non-majoritarian body is very high. But the court's decision is never "final" in the literal sense: in lawmaking, there is no such thing as having "the last word." For one thing, it can always be overridden by constitutional amendment. The degree of "finality" of constitutional court decisions may be then measured by the degree of entrenchment of the constitution: the easier it is to amend the constitution, the less final are the constitutional court decisions. More often than not, constitutional amendment is a costly and burdensome affair, and the examples of amendments introduced specifically to override constitutional court decisions are very few and far between. As far as Western Europe is concerned, Alec Stone Sweet identified only one case of constitutional overturning of the Court Court decision in the four countries he studied (Germany, France, Spain and Italy), namely in France in 1993, when the right-wing majority in the Assembly and the Senate revised the Constitution in order to permit the promulgation of a controversial immigration and asylum law (which had been earlier annulled by the *Conseil constitutionnel*).¹³⁷ In CEE, I know of only one example of overriding the constitutional court by const. amendment: in Hungary in 1990 the Constitutional Court found unconstitutional the absence of a right to vote in general elections by Hungarian citizens abroad, and referred the law to the Parliament demanding a correction. As a consequence, the National Assembly adopted a constitutional amendment which explicitly deprives those persons of a right to vote.¹³⁸

Constitutional amendments may be costly and burdensome, but not necessarily much more costly than the supermajority needed to override (through a non-constitutional procedure) a tribunal's decision in, for example, Poland until 1997 and Romania. As a matter of fact, in Poland until 1997 the requirements for a constitutional amendment were exactly the same as those for a decision overriding the Constitutional Tribunal's decision, and this fact served

¹³⁷ Stone, *supra* note 21 at 89.

¹³⁸ Art. 70.1 of the Constitution of Hungary, see Anna M. Ludwikowska, *Sadownictwo konstytucyjne w Europie Srodkowo-Wschodniej w okresie przekształcen demokratycznych* (TNOiK, Torun 1997), p. 65 n. 32.

as the basis for one commentator's remark that "the override [was] tantamount to [a constitutional] amendment."¹³⁹ In Romania, the difference is that, while both the override and the constitutional amendment require the same parliamentary majority, the amendment also requires a referendum.¹⁴⁰

It should be noted that in Romania – the only CEE country where decisions of the Constitutional Court about unconstitutionality of statutes can be overridden by the parliament – the views about this institutional arrangements are divided though it would be probably accurate to say that the majority of lawyers and commentators consider this possibility as aberration. In Romania, the prevailing opinion among lawyers and other observers of the Constitutional Court seems to be critical of the parliamentary override, on the basis that it weakens the authority of the Constitution. As one observer notes, the availability of an override is "a mistake" and the "Constitutional Court should control all the constitutional affairs".¹⁴¹ The same observer believes that the only reason why the parliament never has actually overridden any Court's decision of invalidation is that the Court never has actually struck down "any really important laws".¹⁴² An eminent constitutional lawyer, and an ex-judge of the Constitutional Court himself, Professor Mihai Constantinescu opines that "this is not a good solution" and as a result, the Constitutional Court's decisions are not really "decisions" but only "suspensive vetoes".¹⁴³ At the same time, he admits that the override is a "largely theoretical possibility" because of an extremely high requirement of 2/3 in both chambers.¹⁴⁴ That is why, as he says, the possibility of override never really concerned him, as a judge. The President of the Constitutional Court believes that the availability of override is "very negative", and that while this provision is on the books, "you cannot have a powerful Court".¹⁴⁵ In an interview, he expressed the hope that "in future this will be abolished" and added that it was the unanimous view of all the Constitutional Court judges.¹⁴⁶ However, there are also views to the opposite, by lawyers who are otherwise supporters of a strong and independent role of the Constitutional Court. For example, Mr Horatiu Dumitru, now a private lawyer and earlier, a lawyer for the government closely involved in the proceedings before the Constitutional Court, believes that the override expresses the fact that the parliament is "the single representative body", and that an override debate

¹³⁹ Schwartz 1993, *supra* note 19 at p. 176.

¹⁴⁰ Article 147 of the Romanian Constitution.

¹⁴¹ Conversation with Prof. Cristian Parvulescu, Bucharest 8 March 2001.

¹⁴² *Id.*

¹⁴³ Conversation with Prof. Mihai Constantinescu, Bucharest 9 March 2001.

¹⁴⁴ *Id.*

¹⁴⁵ Conversation with Prof. Lucian Mihai, President of the Constitutional Court, Bucharest 9 March 2001.

¹⁴⁶ *Id.*

gives the Parliament an opportunity to reconsider the law.¹⁴⁷ He also believes that the possibility of override does not affect the Court's decisions.

As an example of reducing the finality of constitutional court decisions of unconstitutionality, in order to inject a degree of democratic deliberation into the essentially non-democratic process of judicial review one may consider the "notwithstanding" provision of the Canadian Charter of Rights and Freedoms. This provision, in s. 33 of the Charter, states that "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature . . . that the Act or the provision thereof shall operate notwithstanding a provision included in" the Charter's catalogue of freedoms and rights. These declarations can be in effect for up to five years, which is the longest period of time for which a government stays in power without going to the polls, but they can be renewed indefinitely. Section 33, admittedly inserted into the 1982 Charter as a matter of political compromise and used sparingly, may be seen, as an American enthusiast of the provision described it, as "an effort to have the best of two worlds: an opportunity for a deliberative judicial consideration of a difficult and perhaps divisive constitutional issue *and* [as] an opportunity for electorally accountable officials to respond, in the course of ordinary politics, in an effective way."¹⁴⁸ The benefits of this approach seem significant: it allows the court to register its constitutional protest, puts the burden upon the legislature to face the constitutional issue explicitly, symbolically identifies the problem in a matter highly visible to the electorate, but does not distort the legislative will as a requirement of having supermajority in order to override the court's decision necessarily does. It seems like a good compromise between ordinary politics and constitutional concerns, which enhances popular deliberation over constitutional norms without distorting the democratic will. If we believe that the articulation of constitutional norms is a matter of concern not only for the constitutional courts but also for the legislatures, executive branches, and the general public, then the s. 33 compromise may be seen as an attempt "to make ordinary politics and constitutional law penetrate each other"¹⁴⁹ in a way that benefits society overall.

It should be acknowledged, however, that the actual experience with the "notwithstanding" clause (as contrasted to an ideal theory underlying the clause) is, according to a number of Canadian experts, rather disappointing. According to Peter Russell: "The legislative override in the Charter is now in very bad odor in all parts of the country except Quebec. [Many leading politicians] sense the extent to which the public has come to believe the Charter's rhetoric of

¹⁴⁷ Conversation with Mr Horiațiu Dumitru, Bucharest 10 March 2001

¹⁴⁸ M. J. Perry, "The Constitution, the Courts, and the Question of Minimalism", *Northwestern University Law Review* 88 (1993): 84-164 at 158.

¹⁴⁹ Mark Tushnet, "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty", *Michigan Law Review* 94 (1995): 245-301 at 299.

fundamental rights and accept the judiciary's legitimacy as the final arbiter of those rights".¹⁵⁰

The United States Constitution provides for a mechanism of majoritarian constraint on judicial review, in the form of the Article III power of Congress to regulate the jurisdiction of the federal courts. Theoretically at least, the Congress might use this power to foreclose judicial consideration of constitutional challenges to legislation but in fact, although some constitutional lawyers have no doubts about the constitutionality of such a power of foreclosure,¹⁵¹ this has never served as a significant limit upon judicial review. There are various reasons, both political and legal, why the Article III power never served an analogous role to the Canadian Charter's section 33 in insulating controversial legislation from judicial review.¹⁵²

But the very fact that such power exists suggests that, even in a system which is seen as the model for strong judicial review, "finality" of the Court's decisions, which invalidate legislative acts, is qualified. Some writers believe that the Supreme Court's decisions are never really the "last word" on the matter. Rather, they serve to initiate a complex dialogue between the courts and the elected branches of government, in which the latter may attempt to counter the effects of the decision. In a recent study of such interaction between the Supreme Court, the legislative and the executive, Neal Devins has shown that the legislative and executive branches have successfully restricted the impact of the Supreme Court's landmark decision on abortion,¹⁵³ and in consequence, have made the Court reexamine and qualify its own, earlier decision. As Devins concludes, "once a Supreme Court has decided a case, a constitutional dialogue takes place between the Court and elected government, often resulting in a later decision more to the liking of political actors."¹⁵⁴

Devins is correct in saying that, on issues where constitutional interpretation is at stake, "the last word is never spoken,"¹⁵⁵ and that the articulation of a true meaning of constitutional norms is as much a task of the

¹⁵⁰ Peter H. Russell, "The Growth of Canadian Judicial Review and the Commonwealth and American Experiences", in Donald W. Jackson & C. Neal Tate, *Comparative Judicial Review and Public Policy* (Westport, Conn.: Greenwood Press, 1992): 29-39 at 36. The Canadian politicians to whom Russell refers in this quote are the (then) Prime Minister Mulroney and several provincial premiers. For skepticism about this clause, as a vehicle of non-finality, see also James Allan, "Bills of Rights and Judicial Power – a Liberal's Quandary", *Oxford Journal of Legal Studies* 16 (1996): 337-352 at 350 n. 59.

¹⁵¹ Martin H. Redish, "Congressional Power to Regulate Supreme Court Appellate Jurisdiction Under the Exceptions Clause: An Internal and External Examination", *Villanova Law Review* 27 (1982): 900-928. .

¹⁵² See Tushnet, *supra* note 149 at p. 287.

¹⁵³ Neal Devins, *Shaping Constitutional Values* (Baltimore: The Johns Hopkins University Press, 1996).

¹⁵⁴ *Id.* at p. 7.

¹⁵⁵ *Id.* at p. 55.

legislature, the executive, and the general public, as it is of the Supreme Court. It is also the case that the legislative and the executive branch have numerous methods of prevailing over the Court in its interpretation of constitutional rights,¹⁵⁶ although sometimes it may take a lot of time, as for example, the protracted resolution of the child labor issue in the United States indicates.¹⁵⁷

Finally, one should add that the finality of tribunals' decisions may be seen by the legislators sometimes as an advantage rather than as a countervailing, antagonistic power. The fact that legislators work "in the shadow of judicial review" may give them a good excuse for not taking the decisions which the electorate demands -- by anticipating the tribunal's objections or by shifting the responsibility for an unpopular decision to the tribunal. It may provide a convenient excuse: "We wanted to adopt this law, or this policy, but the tribunal would not let us do it." Or, conversely, the tribunal's strong authority may free the parliament to behave irresponsibly. Individual members of a parliament can signal their "right" attitudes (valued by the majority of their constituency) by voting for proposals which they know will not actually become law because the tribunal will strike them down as unconstitutional.¹⁵⁸ Ironically, the tribunal's power to prevail over the legislature may serve the legislature's interests quite well, although perhaps not for the right reasons.

Conclusions

As Alec Stone Sweet wrote recently in his excellent study of the leading Western European constitutional courts:

It would be a mistake to dismiss parliamentary adjudication of rights as inherently less meaningful or less 'judicial' than the deliberations of a constitutional court. Parliament and the court are doing more or less the same thing, speaking in more or less the same language and working through more or less the same normative material. . . . When the court annuls a bill, it substitutes

¹⁵⁶ See generally, L.G. Ratner, "Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction", *Villanova Law Review* 27 (1981): 929-58 at pp. 930-32.

¹⁵⁷ In 1916 and 1919, Congress attempted to strike at child labor indirectly, using the interstate commerce and taxing powers, and the Supreme Court invalidated both of these attempts, in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), and in *Child Labor Tax Case*, 259 U.S. 20 (1922), respectively; in 1938 Congress returned to the original 1916 bill struck down in *Hammer*, and a unanimous Court approved child labor legislation in 1941.

¹⁵⁸ For an example of such behavior in the American context, see J.R. Macey, "Thayer, Nagel, and the Founders' Design: A Comment", *Northwestern University Law Review* 88 (1993): 226-40 at p. 235.

its own reading of rights, and its own policy goals, for those of the parliamentary majority.¹⁵⁹

The observation by Stone Sweet has a universal application, and of course applies equally to constitutional courts in CEE. The decision about allocating authority should always be based on a *comparison* of the relative virtues and vices of different institutions, rather than by looking at various institutions one at a time. Even if we are sceptical about the competence of the legislative process in the rights context, this is not enough to support a shift to the judiciary. We first must be satisfied that the judiciary will provide a superior alternative to the legislature.¹⁶⁰ And in making such an assessment, it is important to guard against the temptation to compare an *ideal* picture of judicial review with a *non-ideal* world of legislative decision making.¹⁶¹

The concern underlying this Working Paper has been that this insight has never been fully internalised in the constitutional discourse in and about constitutional courts in CEE. As a consequence, the vexed question of their legitimacy to undertake robust scrutiny of parliamentary statutes has never been addressed in a fully satisfactory way. What is more, the very question never has been seen as a particularly important one, as the recent fundamental book by Herman Schwartz indicates.¹⁶² Schwartz conducts a thorough, admirably well researched analysis of the five (arguably) most important constitutional courts in the region (in Poland, Hungary, Russia, Bulgarian and Slovakia) and yet he never seems to appreciate the urgency of addressing the legitimacy problem. The fact that “the injection of a judge’s own value judgements is necessary in more than ‘borderline’ cases”¹⁶³ does not seem to trouble him. As this comes from a sensitive, knowledgeable and committed expert, this approach may be seen as indicative of the whole approach to which this Working Paper responds.

To be sure, the “record card” of constitutional courts in Central and Eastern Europe, as far as the protection of constitutional rights and the policing of constitutional allocation of powers are concerned, is on balance positive.¹⁶⁴ While there have been some important decisions in which these courts reversed liberal legislative choices and substituted them with their own, more restrictive articulations of constitutional rights, and many cases of missed opportunities to rectify non-liberal legal provisions, on the whole, the correctives introduced by

¹⁵⁹ Alec Stone Sweet, “Constitutional Dialogues: Protecting Rights in France, Germany, Italy and Spain”, in Sally J. Kenney, William M. Reisinger & John C. Reitz (eds), *Constitutional Dialogues In Comparative Perspective* (London: Macmillan 1999), pp. 8-41 at p. 26.

¹⁶⁰ For a forceful expression of this view, see Neil K. Komesar, “Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis”, *Univ. of Chicago Law Review* 51 (1984), pp. 366-446 at p. 376.

¹⁶¹ See Griffin, *supra* note 103 at p. 123.

¹⁶² Schwartz, *supra* note 1.

¹⁶³ *Id.* p. 88.

¹⁶⁴ See Sadurski, *supra* note 74.

the courts must be viewed as positive. More often than not, the change made by the courts in specific areas should be applauded by observers concerned with a robust, strong protection of civil and political rights, and with the integrity of constitutional separation of powers. This is, at least, the case of the most activist and independent courts of the region: in Hungary, Poland, Slovenia, Czech Republic, and – to a lesser degree – in the Baltic states, Slovakia, Romania and Bulgaria.

But the substantial successes of constitutional courts do not go all the way to address the legitimacy deficit. As Burt Neuborne wrote: “When substantive-review judges identify values and totally insulate them from majority will, the troublesome question of why judges are better than other officials in identifying and weighing fundamental values cannot be avoided.”¹⁶⁵ This is precisely the issue which both the constitutional courts and constitutional doctrine in the region have yet to address.

¹⁶⁵ Burt Neuborne, “Judicial Review and Separation of Powers in France and the United States”, *N.Y.U. Law Review* 57 (1982): 363-342, p. 368.



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